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A

MEMOIR OF THE LIFE

OF

ROBERT HENLEY,

EARL OF NORTHINGTON,

LORD HIGH CHANCELLOR

OF

GREAT BRITAIN.

BY

THE RIGHT HONOURABLE

ROBERT LORD HENLEY,

HIS GRANDSON.

Me non accipere modo hæc a majoribus voluit,
verum etiam posteris tradere.

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
MDCCCXXXI.

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TO

THE RIGHT HONOURABLE

JOHN EARL OF ELDON,

TWENTY-FIVE YEARS

Lord High Chancellor of Great Britain,

THIS

MEMOIR OF THE LIFE

OF ONE OF HIS PREDECESSORS,

IS MOST RESPECTFULLY INSCRIBED,

BY

HIS GRATEFUL AND OBLIGED SERVANT,

THE AUTHOR.

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A

MEMOIR,

&c.

The lives of Eminent Lawyers form an interesting study in a country like ours, whose tribunals occupy so much of the public attention; and where a considerable portion of the community, from being entrusted with some share in the administration of the law, is in frequent intercourse with its professors. We therefore find that the Profession, though watched with great jealousy in any assumption of influence beyond its legitimate sphere, has always been sufficiently popular with the people of England. The great men who rise to distinction in it, are objects of interest to the public, which marks their rise, their progress, and their elevation; and derives amusement from noticing their peculiarities and recording their sayings.

It might, therefore, have been expected that, amidst what Dr. Johnson terms the *penury of English Biography*, the Law would have furnished many interesting exceptions to the generality of his remark. Our specimens, however, of legal biography are far from being either numerous or valuable. We possess, it is true, good contemporary accounts of Hale, of Selden, and of Clarendon; and the great research and learning of the Editors of the Biographia Britannica have presented us with elaborate lives of Coke, Bacon, and Ellesmere. We have all derived amusement from the rich fund of professional gossip which Roger North gives in the life of his brother, Lord Guildford; and few have perused without delight the polite and elegant Memoir of Lord Chief Justice Wilmot, written by his son. The public has also recently received from Mr. Roscoe some interesting additions to this department of our literature.

On the other hand, the lives of such eminent men as Lord Somers and Lord Hardwicke have been written in a manner totally

unworthy of their high reputations. Of Lord Nottingham, Lord Holt, nay, even of the great Lord Mansfield, we have still but meagre and unsatisfactory accounts; whilst of the Chancellors Cowper, Harcourt. Macclesfield, King, and Talbot, all considerable judges and statesmen in their time, and principal actors in the great political events of their day, we have little information beyond the scanty notices of the Peerage.

It is far from my intention to rank the subject of the present Memoir with the more prominent names in this illustrious list. I should do no service to his memory were I to assume for him a place by the side of Nottingham, the great father of equity: of Somers, the bright union of the patriot, the statesman, and the magistrate: or of Hardwicke, the most consummate and faultless judge that ever presided in our tribunals.

Still, however, it may be no uninteresting study to dwell upon the life of one, who, rising through the gradations of the profession, reached its highest station, and retained it for a space of Nine years with much honour

and credit. If without the commanding genius and immense attainments of some who preceded him, or of one or two who have followed; yet his manly and decisive mind, his clear, strong, and vigorous judgment, united to a well-grounded and practical knowledge of his profession, have gained him a great and respectable name among the Chancellors of England. I trust, therefore, that I may be permitted, without further apology or comment, to introduce this short Memoir of his Life to the notice of my readers.

Robert Henley (afterwards Lord Keeper and Chancellor, and Earl of Northington,) was descended from the ancient family of the Henleys, of Henley in Somersetshire, the elder branch of which was advanced to the dignity of the Baronetage in 1660. Various other parts of the family appear at different times to have settled in Hampshire, Dorsetshire, and Norfolk.*

* I have been frequently asked, whether the celebrated *Orator Henley*, the theme of so much of Pope's

His great grandfather, Sir Robert Henley, was Master of the Court of King's Bench, on the pleas side, which must have been an extremely lucrative situation, as from the profits of it he left to his family a landed estate of above 3000*l.* a year, part of which consisted of the ground rents of Lincoln's Inn Fields. He acquired the fine estate of the Grange, in Hampshire; which, when afterwards in the possession of his descendant the Lord Keeper, Horace Walpole speaks of, in his Letters, with admiration. The house was built for Sir Robert Henley by Inigo Jones, and the same writer, in another part of his works, mentions it as one of the best proofs of his taste, and cites the hall and the staircase adjoining, as beautiful models of the purest and most classic antiquity. The critic, however, was, I suspect, misled by the respect due to the name of Jones. The concurrent testimony of all who remember it as it then was, represent it, notwith-

wit, was of this family. The connection I find was always disavowed. The Orator was born at Melton Mowbray, of which his father was Vicar.

standing the merit of these individual parts, as, upon the whole, a heavy and gloomy structure, utterly unworthy of the great architect. Since then, however, the wealth and taste of Mr. Alexander Baring, the present possessor, and previously of Mr. Drummond, into whose hands it passed on the death of the second Earl of Northington, have so embellished and altered it, that not a vestige of its antient appearance remains. The former of these gentlemen has converted the style of the mansion into the most elegant Grecian, and superadded a conservatory of so splendid a description, that it is alone reputed to have cost many thousand pounds. But while the eye admires this sumptuous achievement of wealth, our feelings cannot but regret that some domestic specimen of Tudor architecture had not been originally adopted, which would have harmonized better with the English beauties of this charming park.

The third son of this person was also Sir Robert Henley, and sat in the parliament of 1679, for the Borough of Andover. He was

the father of a numerous family, the eldest of whom was Anthony Henley.

The name of Anthony Henley, one of the politest and most accomplished men of his day, frequently occurs in the Memoirs and Correspondence of the Reign of Queen Anne. He was bred at Oxford, where he distinguished himself by an early relish for literature and by the great refinement and elegance of his taste. On coming to London he was admitted to the friendship and society of the first wits of the time. He was the friend of the Earls of Dorset and Sunderland, and the companion of Swift, Pope, Arbuthnot, and Burnet. "It was thought strange," says his biographer,* "as every one knew what a secret influence he had on affairs in King William's court, that he, who had a genius for anything great as well as anything gay, did not rise in the state, where he would have shone as a politician no less than he did at Will's and Tom's as a wit. But the Muses and plea-

* Memoirs of Persons who died in 1711. 8vo. 1712.

sure had engaged him. He had something of the character of Tibullus, and, except his extravagance, was possessed of all his other qualities—his indolence, his gallantry, his wit, his humanity, his generosity, his learning, his taste for letters. There was hardly a contemporary author that did not experience his bounty." He was the patron of Garth, who dedicated to him his poem of the Dispensary. He was a frequent contributor to the periodical works of the day, especially to The Tatler and The Medley. But his favourite pursuit was music, of which he was so entirely master that his opinion is said to have been the standard of taste. He married Mary, daughter and coheiress of the Honourable Peregrine Bertie, second son of Montague, Earl of Lindsey, the ancestor of the Dukes of Ancaster, with whom he had a fortune of £30,000.

On becoming a husband and a father Anthony Henley relinquished the gaieties of fashion, and was chosen member of parliament for Andover in 1698, after which he represented Weymouth and Melcombe Regis

till his death. He was always a zealous asserter of liberty in the House of Commons; and was the mover of the Address to Queen Anne, that she would confer on Hoadley some dignity in the church, as a reward for asserting and vindicating the principles of the Revolution. This made him so odious to the Tory administration, that strong endeavours were used by them to prevent his return to her last parliament, both at Weymouth, and afterwards in the House; but without effect.

He died in August, 1711, leaving three sons: 1st, Anthony; 2d, ROBERT; and 3d, Bertie, who was in orders, and died unmarried in 1760.

His eldest son was a man of dissipated habits and unbridled wit.* He signalized

* I have always understood in the family that this was the individual who made himself so notorious by his frolics and profusion; but I find from the Biographical Dictionary, that the same character is given of his cousin Anthony Henley, the eldest son of Sir Andrew Henley, Bart. of Bramesley, near Hartley Row, in Hampshire, who is said to have run through a great estate in that and the other western counties.

himself by several vagaries and oddities, which were much talked of at the time, and particularly by a humorous but insolent reply to his constituents, who had desired him to oppose Sir Robert Walpole's famous excise scheme. He married Elizabeth, eldest daughter of James, third Earl of Berkeley, but died without issue in 1745.

Robert Henley, the second son of the first named Anthony Henley, is the subject of the present Memoir. I have not been able to ascertain the precise date of his birth, which must, however, have taken place about the year 1708. He received his education, with Lord Mansfield, at Westminster, to whom he was junior about four years; but in consequence of the latter having spent some time in travelling on the continent after he had quitted Christ Church, there was but a few months difference between their respective standing at the bar; Lord Mansfield being the senior by three terms. Another distinguished schoolfellow of his was Sir Thomas Clarke, the Master of the Rolls. It is a singular circumstance that the three

highest stations in the law were occupied at the same moment by three Westminster men. Lord Northington being Lord Chancellor; Lord Mansfield, Chief Justice of the King's Bench; and Sir T. Clarke, Master of the Rolls.* Murray and Clarke were both in college; Henley was of the school. Among the other remarkable persons who were educated there at the same time were Bishop Newton; Stone and Robinson, both successively Primates of Ireland; Johnson, Bishop of Winchester; and Andrew Stone, subgovernor to George the Third when Prince of Wales.

Having finished his education at Westminster, Henley was entered at St. John's College, Oxford, on the 19th of November, 1724, when he is stated to have been only

* Bishop Newton remarks, as a still more extraordinary circumstance, that out of the twelve judges at that time, five of them should have come from Lichfield school; Lord Chief Justice Willes, Chief Baron Parker, Mr. Justice Noel, Mr. Justice (afterwards Lord Chief Justice) Wilmot, and Sir Richard Lloyd, Baron of the Exchequer.

sixteen years of age. On the 3d of November, 1727, he was elected a fellow of All Souls', but not being of founder's kin, was not admitted till the following year. He took his degree of Master of Arts on the 5th of July, 1733.

He commenced his professional career by entering at the Inner Temple on the 1st of February, 1728, and was called to the bar by that society on the 23d of June, 1732. He was, indeed, admitted of Lincoln's Inn on the 23d of April, 1745, but this was only for the purpose of holding chambers, as he continued of the Inner Temple, of which society he became a bencher in Michaelmas Term, 1751.

Murray, we are told, "when he first came to town drank Champagne with the Wits." His classic tastes and literary attainments, says a biographer, led him to prefer the society of scholars and men of genius, to that of his professional brethren. Henley, also, was not without *his* potations, but they were the juice of a more powerful vintage, and perhaps flowed in more copious streams.

Besides, though both a scholar and a wit, his conversation was too boisterous and jovial to be endured in the circles where the accomplished Murray shone. A few All Souls friends, or some congenial spirits of the Temple, were the companions, after the labours of the day, of his convivial hours. The truth is, that drinking was at that time the ruling vice and bane of society, and Henley was not at his early period of life fortunate enough to escape the general contagion. His errors, however, were no more than what most high spirited and ardent youths in some way or other fall into at their first entrance into life, and he soon recovered from their influence; but many a severe fit of the Gout was the result of his early indulgencies. When suffering from its effects, he was once overheard in the House of Lords to mutter after some painful walks between the Woolsack and the Bar, "If I had known that these legs were one day to carry a Chancellor, I'd have taken better care of them when I was a lad."

His family connections naturally led him

to make choice of the Western Circuit, which he cultivated with great assiduity, and with such success, that he rose in due time to be its leader. Bishop Newton speaks of him as having evinced lively parts and a warm temper, but being, like many others of his profession, too apt to take liberties in examining witnesses. He relates an anecdote of his having cross-examined a Quaker, of the name of Reeve, at Bristol, with so much raillery and effect that, forgetting the pacific tenets of his sect, he insisted upon an apology, which Henley, sensible that he had exceeded the bounds of professional license, very frankly made. Their connection, however, did not terminate here; for many years afterwards, when he was Lord Chancellor, having had a couple of pipes of Madeira consigned to him at Bristol, he remembered his friend Reeve, and employed him to pay the freight and duty, and send them to the Grange. "The winter following," says the Bishop, "when Mr. Reeve was in town, he dined at the Chancellor's, with several of the nobility and gentry. After

dinner, the Chancellor related the whole story of his first acquaintance with his friend Reeve, and of every particular that had passed between them, with great good humour and pleasantry, and to the no little diversion of the company."

Henley, at this period of his life, passed most of his vacations and leisure hours at Bath, which in those days was in its zenith of fashion and gaiety. He became Recorder of it, and gained such an influence in its select corporation, that he managed to represent the city during the whole time that he continued in the House of Commons, which was from the year 1747 until his elevation to the seals in 1757.

It was here that he first formed the acquaintance of the lady whom he was afterwards fortunate enough to marry, and to whom he was indebted for the enjoyment, during the remainder of his life, of that first of human blessings--a serene and happy home. She was the daughter and co-heiress of Sir John Huband, of Ipsley, in Warwickshire, Bart., the last of a " time-honoured

race," whom Dugdale states to have been lords of that manor in lineal succession from the Conquest. She was beautiful, but though extremely young, had from an illness so entirely lost the use of her limbs that she was only able to appear in public wheeled about in an arm-chair. Henley, attracted by the charms of her face and conversation, soon found his acquaintance ripen into a tender and lasting attachment. The waters produced so complete and effectual a cure that Miss Huband was not only enabled to comply with the custom of the place, by hanging up her votive crutches to the nymph of the spring, but to the end of a long life enjoyed a most perfect state of health. She gave her hand in the year 1743 to the suitor who had so sedulously attended her.

The ceremony was performed by his distinguished schoolfellow Bishop Newton, of which that prelate in his Memoirs has the following agreeable recollection. " It happened that he and his lady were married by Mr. Newton, at the chapel in South Audley Street, at which time they were a very hand-

some couple. Several years afterwards Mr. Newton went one day into Lincoln's Inn Hall while the court was sitting, to speak with Mr. Murray upon some business; Mr. Henley being next to him and reading a brief. When he had dispatched his business and was coming away—'What,' said Murray to Henley, 'have you forgotten your old friend Newton, or have you never forgiven the great injury that he did you?' Upon which he started as out of a dream, and was wonderfully gracious to his old schoolfellow, acknowledging that he owed all his happiness in life to him. And, indeed, he had good reason to be happy in his wife and family."

The newly married couple started with but a slender means. Henley was still but a younger brother; and the principal part of his income arose from his business, which had not yet become considerable. The exact amount of his wife's fortune I have no means of knowing, but it was certainly small. It consisted, however, of a share of the paternal acres of Ipsley, as I find by a case laid before counsel upon the construction of Lord

Northington's will, that nearly thirty years afterwards he was in treaty for the disposal of it. Their first residence was a small house in Great James Street, Bedford Row, where they lived the three first years of their marriage in great content, and in a style congenial with the simplicity and modesty of their tastes. Indeed, the distinguishing feature of Henley's character was, that usual mark of superior minds, *Simplicity*. His aversion to show and display was extreme; and though he took care that the necessary splendour of the high offices which he afterwards filled, should be provided with a free and liberal spirit, yet he always felt the trappings of his station as an incumbrance which it was his duty to endure, rather than a gratification that flattered his vanity. Both he and his wife would often after he became Lord Chancellor and Lord Lieutenant of Hampshire, look back with pleasing recollection from the Grange and Grosvenor Square to the freedom and frugality of their early establishment.

Two years after Henley's marriage his elder

brother, Anthony, died without issue, upon which the paternal estates in Hampshire and Dorset, together with the house in Lincoln's Inn Fields, descended upon him. The estate, I have heard in the family, he found much encumbered by his elder brother; but the prosperity and good management of a few years, not only restored it, but greatly increased it in extent and value. The town house, in which he continued to reside for a long time after he had the seals, was on the south side of Lincoln's Inn Fields, and is the same which is now occupied by the College of Surgeons.

In the year 1747, a new sphere was opened to his energies and ambition, by his return to parliament for Bath, and he seems to have lost few opportunities of making himself useful to the party whose politics he espoused. In the publication of the Parlamentary Debates, indeed, his name occurs but rarely. It appears, however, from Horace Walpole's Journal, and from contemporary Memoirs and Letters, that he was a frequent and active debater. He was a firm and constant sup-

porter of the politics of Frederick, Prince of Wales, whose party was designated by the appellation of *Leicester House*. The legal portion of this phalanx consisted, besides himself, of Sir Thomas Bootle, the Chancellor of the Duchy, Dr. Lee, Mr. Forrester, and Mr. Hussey; but the most prominent lawyer of the party, perhaps, was the Hon. Hume Campbell, afterwards Earl of Marchmont, who, during the former part of the period we allude to, was attorney general to the prince, but resigned that post when his royal master organized his last opposition. Walpole, with his usual malevolence, says, that he was supposed to have received a considerable pension for his secession. This nobleman, who is now best known as the friend of Pope, and as the individual to whom Johnson applied for materials in writing the poet's life, concluded his professional career by obtaining the office of Lord Registrar of Scotland for life.*

* The public will soon be gratified by the publication of Selections from the Papers of the Earls of Marchmont, by Sir G. H. Rose.

When the death of the Prince of Wales in March, 1751, deprived the party of its head, several members of it, like Dodington, seized the opportunity of deserting their ranks, and made their submission to the court. Mr. Henley, however, continued firmly attached to the family of his royal patron, and by this adherence to his party during a period of great discouragement and extensive defection, acquired the lasting esteem and favour of the Princess Dowager. To his conduct at this crisis may be attributed the more brilliant part of his subsequent career; for while he laboured during the remainder of that reign under the displeasure of the sovereign, which was evinced in a very marked way by his being so long debarred from the honours which usually accompany the seals, he laid the foundation of that confidence and regard in the breast of the Heir Apparent, which he enjoyed without a check during the whole of his public life. When the young prince's household was established he was chosen to be his solicitor general, and shortly after-

wards was promoted to be attorney general. It was in consequence of this appointment that he was made king's counsel.

In May, 1756, an important vacancy was occasioned in the profession by the sudden death of Lord Chief Justice Ryder, who was carried off while the patent for his peerage was actually in preparation.* Murray, in conformity to his uniform assertions, that he meant to rise by his profession and not through the House of Commons, insisted upon his right as attorney general to succeed to the vacant post. Such, however, was the state of distress to which the Duke of Newcastle had been reduced by the disgraceful loss of Minorca, and the affair of Admiral Byng, that he could not consent to forego so accomplished and efficient a support in the House of Commons. Accordingly great

* The family was not ennobled till twenty years afterwards, when the promise made to the father was thus kept to the son, which gave the opportunity of adopting one of the happiest and most beautiful mottos that ever has been chosen. "*Servata fides cineri.*"

offers were made to him, provided he would decline, if it were but for eight months, the chief justiceship and the peerage which was to accompany it. Walpole says, that they offered him the Duchy of Lancaster for life, with a pension of £2000 a year, permission to remain attorney general, and the reversion of the first tellership of the exchequer for his nephew, Lord Stormont. At the beginning of October, they bid up to £6000 per annum in pension. They pressed him to stay but a month; nay, only to defend them on the first day.

This statement is obviously tinctured with Walpole's usual spite against the Duke of Newcastle, and certainly exaggerated. It is, however, clear, from the circumstance of the minister keeping so important a post as the chief justiceship of England vacant, during a period which comprized a whole term and a circuit, that some difficult and important negociation was depending respecting it. Murray at last peremptorily declared that if he was not to be chief justice, neither would he

be any longer attorney general, and accordingly, after the situation had been vacant upwards of five months, he was elevated to it on the 6th of November, 1756.

The resignation of the Duke of Newcastle and the establishment of what is usually termed Mr. Pitt's first ministry, brought with them several important legal changes. The most considerable of these was the retirement of Lord Hardwicke, who had been chancellor for more than twenty years, and had administered the duties of his high station with an ability that never had been exceeded by any of his predecessors. I cannot resist quoting the words of one who had practised for many years before him, not on account of any extraordinary powers of description or felicity of diction, but as having been often struck by the remarkable similarity which this sketch of his character bears to that of one of his most illustrious successors now living. This eminent person has closely resembled him, not only in the great length of time during which he held

the seals,* but in the more important particulars of wisdom, patience, sagacity, and acuteness, in the vast extent of his learning, and, most of all, in that condescending gentleness and affability of manner, which conciliated the affections of all who had the happiness of practising before him, and won the more irresistably as it was the spontaneous overflow of a kind, humble, and benevolent heart.

"To Lord Hardwicke," says that writer,† "I am indebted for the little knowledge I may have obtained in the profession; and I cannot let this opportunity pass without expressing my grateful remembrance of the encouragement, which, in common with other young gentlemen at the bar, I experienced from him. That noble person was indeed

* The three chancellors who have held the seals the longest are—Lord Ellesmere, who held them twenty years within a few days; Lord Hardwicke, twenty years and nine months; and Lord Eldon, during the two periods of his being in office, twenty-five years within a few days.

† Ambler's preface to his Reports.

eminently qualified for the high office which he filled for more than twenty years, with the greatest reputation to himself and satisfaction to the public. His knowledge was sound and extensive; the clear and comprehensive manner in which he delivered his opinions could not but make the dullest hearer sensible of their weight. He shone in those chief characteristics of a judge, temper and patience. He heard all with attention and then decided with readiness, enforcing his decrees with such convincing reasoning as equally gave information to the bar and satisfaction to the parties. *Etiam quos contra statuit æquos placatosque dimisit.* He greatly encouraged industry in young gentlemen, by showing particular attention to their arguments, and noticing what would admit of approbation. He was engaging and polite in his manner, and yet failed not in every point to support the dignity of his office. He commanded universal esteem and reverence."

Mr. Henley was now soon to reap, in the various changes of the day, the fruit of his

long attachment to his political friends. It appears from Lord Waldegrave's account, (an indubitable authority on this point,) that the party of Leicester House, which, under the protection of the Prince of Wales had been growing strong and formidable, immediately after his decease became languid and inanimate. The princess dowager apparently submitted herself entirely to the guidance of the king, and the Duke of Newcastle was her favourite minister. In the course of the year 1755, however, a sudden change took place in the conduct both of the princess and the heir apparent. The Duke of Newcastle was evidently slighted, and Mr. Pitt being introduced by the great favourite Lord Bute, a formal arrangement was made that Mr. Pitt and his friends should support the princess and her son. From this time the party of Leicester House, though not ranging itself as formerly in avowed and indecorous opposition to the court, being thus fortified by the accession of Mr. Pitt and his personal followers, presented a phalanx made formidable by the circumstance of the public men of the

day being split into various selfish and venal factions.

It is painful to pursue through the pages of Dodington and Waldegrave, the tissue of vulgar intrigues, from which not even the lofty spirit of Mr. Pitt was free, and which so pre-eminently disgrace the annals of this period. The result of an abundance of shuffling, bullying, and deception, was, that the king was reluctantly obliged to submit to Mr. Pitt's demands, and that a new administration was formed, composed in a great measure of his friends.

In the negotiations for the formation of this ministry, the most strenuous endeavours were made to induce Lord Mansfield to accept the seals; but his attachment to the Duke of Newcastle, and his disinclination to a political life, led him to decline the office. As no immediate successor presented himself, the usual expedient of a weak and unsettled ministry, of putting the great seal in commission, was adopted during this troubled season. The three Lords Commissioners were Sir John Willes, Chief Justice of the Common

Pleas; Sir John Eardley Wilmot, then a Judge of the King's Bench, and afterwards Chief Justice of the Common Pleas; and Sir Sidney Stafford Smythe, a Baron of the Exchequer, and afterwards Lord Chief Baron.

Mr. Henley, having been previously knighted, was appointed to the office of attorney general, vacated by Lord Mansfield's promotion; Charles Yorke was made solicitor general, in the room of Sir Richard Lloyd, who was displaced, but afterwards made a Baron of the Exchequer. During this short administration, and the period of uncertainty and negotiation which succeeded it, Sir Robert Henley continued as attorney general. In this situation, conformably to what had heretofore been usual upon promotion to the offices either of attorney or solicitor general, he left the King's Bench, where he had been in the first practice, and removed into the Court of Chancery. He was, however, not long to remain there in a subordinate situation.

Mr. Pitt's administration had been no sooner formed than the king made no secret

of his aversion to it, and entered into active and almost undissembled negotiation to overthrow it. As the minister did not choose to assist the measures of his enemies by his resignation, he was actually turned out in April, 1757, and the king knocked at every door to obtain an administration that would, at least, not be personally disagreeable to him. He even went so far as to confide the formation of a new administration to Lord Waldegrave, who attempted to form a government with Fox, to the exclusion of Pitt and Lord Temple, and without the present aid of the Duke of Newcastle. The king, however, soon saw that such a measure would not succeed, and removed the negotiation into Lord Mansfield's hands, who was to treat with the duke and Pitt on the terms of excluding Temple and including Fox. But Lord Mansfield's success was no better than that of his predecessor's, and the credentials were at last transferred to the able and experienced management of Lord Hardwicke.* Thus

* See the interesting review of Lord Waldegrave's Memoires in the Quarterly Review, No. L. where all these intrigues are neatly condensed.

was effected the coalition administration of 1757. The high contracting parties were Mr. Pitt with Leicester House, the Pelhams, and the Tories. Unlike its more celebrated namesake of 1783, it brought no obloquy upon the principal actors in it, and was viewed with indifference by the nation. Indeed, the great disputes in politics had long since degenerated from fundamental principles of government, or important systems of policy, into discreditable squabblings for the emoluments of office.

In the discussions which preceded the final arrangement of the administration, considerable difficulty was experienced as to the mode in which the great seal should be disposed of. Lord Mansfield was again tempted with the golden bait, but he preferred to continue in his less elevated but more secure station. The eye of the public was, therefore, naturally turned upon the individuals who were then holding it in commission.

In the opinion of many, says his biographer, Sir John Eardley Wilmot was the person to whose custody it would shortly be

committed; an event, the possibility of which that modest and excellent person seems to have regarded with the greatest apprehension. In a letter to his brother, he says, "the acting junior of the commission is a spectre I started at, but the sustaining the office alone I must and will refuse at all events. I will not give up the peace of my mind to any earthly consideration whatever. Bread and water are nectar and ambrosia compared with the supremacy of a court of justice."

It is, however, certain that the offer was not made to him at this juncture, though afterwards in the year 1770, on the resignation of Lord Camden and the death of Mr. Yorke, the Duke of Grafton tendered the seals to him for his acceptance; he, however, declined them; and in the same year, when the offer was repeated by Lord North, he persisted in his modest but firm refusal. The highest place in his profession had few charms for one who so deeply loved the calm pleasures of private life.

Lord Mansfield having been found inexorable to all the entreaties of the negotiators,

the person fixed upon was the first Lord Commissioner, Chief Justice Willes. The offer, however, was with the title of Lord Keeper only, without a peerage or a retiring pension.* This proposal he thought fit to decline, in hopes of more honourable and advantageous terms.

The refusal of Willes, however, did not delay the course of the ministerial arrangements, which drew to a close without even a repetition of the offer. He was a sound lawyer; and had filled the post of Attorney General, but he seems never to have taken

* There is a wretched and malevolent work, purporting to be An Essay on the Life and Character of Philip Earl of Hardwicke, by R. Cooksey, Esq. of the Inner Temple, against which the reader should be cautioned; the author asserts that Lord Hardwicke, in conducting the negotiation, had agreed with Willes that a peerage, pension, and tellership of the Exchequer should, as of course, attend the appointment, but that he represented these demands to the king as unreasonable and improper to be granted, which occasioned his majesty to enquire whom else these negotiators had to recommend, and that upon that Henley was proposed, as much to his own surprize as to that of the profession.

an active part in politics, and he was not at this juncture thought of sufficient importance to receive any higher offer for his services. The Duke of Newcastle had in the course of the arrangements pressed upon Mr. Pitt, as the King's personal request, that Lord Hardwicke should have a seat in the cabinet. Mr. Pitt consented on certain conditions; and he then urged it as a stipulation which had been made on the part of Leicester House, that Sir Robert Henley should have the Seals as the reward of his long and faithful adherence to its politics. Though he was personally unacceptable both to the King and the Pelhams, it was not thought fit to resist this claim, and accordingly the vacant office was conferred upon him.

There is an amusing anecdote respecting this transaction current in the profession, and which the late Lord Ellenborough used to relate with his characteristic humour. Immediately after Willes had refused the Seals, Henley called upon him at his villa, and found him walking in his garden, highly indignant at the affront which he considered

that he had received in an offer so inadequate to his pretensions. After entering into some detail of his grievances, he concluded by asking whether any man of spirit could, under such circumstances, have taken the Seals; adding, "Would you, Mr. Attorney, have done so?" Henley thus appealed to, gravely told him that it was too late to enter into such a discussion, as he was then waiting upon his Lordship to inform him that he had actually accepted them.

Lord Waldegrave states in his Memoirs, that Sir Robert Henley obtained with his elevation the grant of a retiring pension and a reversion of a tellership of the Exchequer. This, however, is a mistake: he accepted the Seals upon the same terms only on which Willes had refused them—a daring step in those days, before the legislature had provided a retiring pension as a refuge from the caprices of fortune and the uncertainty of party. Whether he considered that his private fortune would be sufficient for his wishes in case he were to quit office; or had deter-

mined in that event, like Pemberton,* to return to his practice at the bar; or whether, as is most probable, in the hurry of ambition, and amidst the calls of party, he thought little of the future, but fixed only his eyes on the splendid prize before him, it is now impossible to determine. On the 30th of June, 1757, he was sworn into the office of Lord Keeper of the Great Seal.

His new and elevated situation, however, brought with it no small degree of difficulty and anxiety. To follow, as his almost immediate successor, the great and accomplished magistrate who had held the Seals for so many years with such extraordinary reputation, was in itself no enviable task. Sir Robert Henley had besides the mortification of having to preside for nearly three years in the House of Lords as a commoner, while the office of directing that assembly when sitting in its judicial capacity, devolved exclusively upon Lord Hardwicke and Lord Mansfield. Nei-

* Pemberton, after having been chief justice, first of the King's Bench and then of the Common Pleas, upon being displaced, practised for many years at the bar.

ther of these noble persons were connected with him either by personal or political connections, and both of them regarded his elevation with no favourable aspect.

Lord Hardwicke's strong personal influence over George II., and the monarch's natural jealousy of Henley's connection with Leicester House, would probably have excluded him from the Peerage during the remainder of that reign. It was to the accident of Lord Ferrers's trial that he owed his immediate elevation to it. It was thought proper that the first law officer of the Crown should on that occasion, as usual, preside as Lord High Steward. He was accordingly, by letters patent bearing date the 27th of March, 1760, created Baron Henley, of the Grange, in the county of Southampton.

Notwithstanding his elevation to the Peerage, he still, however, continued to hold the Great Seal, with the title of Lord Keeper. It is a common error, and one which even learned members of the profession frequently fall into, that the designation of the person holding the Great Seal depends upon his

rank; and that if a commoner in that situation, he is Lord Keeper; if a peer, Lord Chancellor. This, however, is entirely erroneous, as the style of the officer depends upon the title with which the king is pleased to deliver to him the Great Seal. The two officers are by act of parliament of precisely the same power, dignity and station.* Thus, since Henry VIII.'s time, Sir Thomas Moore, Sir Richard Rich, Sir Thomas Bromley, Sir Christopher Hatton, though all commoners, were Lords Chancellors: while, on the other hand, Lord Coventry and Lord Guildford; Goodrick, Bishop of Ely; Gardiner of Winchester; Archbishop Williams, and as we see in the present instance, Lord Henley, were Lords Keepers, being peers of parliament. However, notwithstanding the statute, there has, in fact, always been a tendency to con-

* The 5 Eliz. c. 18, for declaring the authority of the lord keeper of the great seal and the lord chancellor to be one, enacts and declares that the keeper of the great seal hath always had, and of right ought to have, like place, authority, pre-eminence, jurisdiction, execution of laws, &c. as the Lord Chancellor of England.

sider the office of Lord Keeper as the inferior office, there being many promotions, like Sir Thomas Audley, Lord Ellesmere, Lord Bacon, Lord Nottingham, Lord Somers, Lord Harcourt, and this of Lord Northington, from the office of Lord Keeper to that of Chancellor, (generally also made at the time when the party was elevated to the peerage, but not one of a Lord Chancellor becoming Lord Keeper.

This memorable trial took place in Westminster Hall before the House of Peers, on the 16th of April, 1760, and the two following days. It excited great interest at the time, and has since become a leading authority whenever a question arises upon the extent or degree of mental derangement which can absolve a prisoner from legal responsibility for acts of violence and atrocity. Earl Ferrers had been divorced from his wife by act of parliament, and the steward of the family, whose name was Johnson, had taken part with the Countess in that proceeding, and conducted the bill through both houses. The Earl consequently wished to

turn him out of a farm which he occupied, but the estate being in trust, Johnson was supported by the trustees in the possession of it. There were also differences respecting coal mines, and in consequence of both transactions Lord Ferrers took up a most violent resentment against him. Having for some time, however, dissembled his anger under an appearance of great good humour, he prevailed upon the unhappy man to come to his house, having previously sent the family and most of the servants out of the way. He then tendered to Johnson a paper for his signature, containing what he termed a confession of his villainy, and on his refusal to sign it, he shot him, while on his knees imploring mercy. Lord Ferrers's conduct after the fatal act demonstrated from many circumstances that he was conscious both of the magnitude and of the consequences of his crime. And though in compliance with the wishes of his friends he permitted the defence of insanity to be set up, yet he was ultimately ashamed of it and disavowed it; having both by the acuteness of his argu-

ments and the intelligence of his questions to the witnesses, completely confuted his own defence.

Both the Attorney General (Pratt, afterwards the great Lord Camden,) and the Solicitor General (Charles Yorke) appear to have conducted the prosecution with great force and ability. The peroration of the reply of the latter is very remarkable. After commenting at length upon the nature of the defence of insanity, he proceeds as follows: "My Lords, in some sense every crime proceeds from Insanity. All cruelty, all brutality, all revenge, all injustice is Insanity. There were philosophers in ancient times who held this opinion as a strict maxim of their sect; and my Lords, the opinion is right in philosophy, but dangerous in judicature. It may have a useful and a noble influence to regulate the conduct of men, to control their impotent passions, to teach them that virtue is the perfection of reason, as reason itself is the perfection of human nature; but not to extenuate crimes, nor to excuse those punishments which the law adjudges to be their due."

Lord Erskine, in his profound and luminous disquisition on the subject of insanity on Hadfield's trial, has commented with irresistible force upon the circumstances of this extraordinary case. He there triumphantly established the true distinction to be applied in cases of this nature, and the subsequent practice of the most enlightened judges has sanctioned and adopted it. It may now be considered as the established principle, that it is not every departure from sound reason, though sufficient to deprive an individual of the management of his concerns, that will deliver him from an indictment for murder or other criminal violence; but that the act itself must have been committed under the dominion of *morbid delusion*. Immunity from punishment cannot be extended to those persons whose insanity is *without delusion*, however strongly characterized by *violence, turbulent passion, or inconsistency*.

Horace Walpole's account of the trial is one of the most lively of his sallies, though deformed by indiscriminate abuse of every one, great or good, that comes within reach

of his satire. "Who at the last trials," he says, "would have believed a prophecy that the three first men at the next should be Henley the Lawyer, Bishop Secker, and Dick Grenville."* He notices with much spleen the want of dignity of the Lord High Steward. "The judge and criminal," he observes, "were far inferior to those you have seen.† For the Lord High Steward he neither had any dignity, nor affected any. Nay, he held it all so cheap, that he said at his own table t'other day, 'I will not send for Garrick and learn to act a part.'"

It is difficult to determine what degree of credit can be given to the representations of such a wholesale dealer in detraction. The truth of the charge cannot now be ascertained, nor indeed is it a very serious one if true. It must, however, be admitted that the observation about Garrick bears strong internal evidence of authenticity. But whatever may have been the Lord High Steward's

* Lord Temple, who as Privy Seal took precedence of Dukes.

† Alluding to the rebel peers in 1745.

outward demeanour, the more important parts of his duty appear to have been performed with a weight and dignity suitable to the occasion. The sentence in which judgment of death was pronounced upon the unhappy prisoner, is one of the best specimens of judicial eloquence in existence. It is at once grave, simple, dignified, and affecting.* As it is very short, it may not be improper to present the reader with it at length.

"LAWRENCE EARL FERRERS,

"His Majesty, from his royal and equal regard to justice, and his steady attention to our constitution, (which hath endeared him in a wonderful manner to the universal duty and affection of his subjects,) hath commanded this inquiry to be made, upon the blood of a very ordinary subject, against your

* It is singular that Mr. Justice Buller, in pronouncing judgment of death on Donnellan, adopted several sentences from Lord Northington's address verbatim.

Lordship, a peer of this realm. Your Lordship hath been arraigned; hath pleaded and put yourself on your peers, and they, (whose judicature is founded and subsists in wisdom, honour, and justice,) have unanimously found your Lordship guilty of the felony and murder charged in the indictment.

" It is usual, my Lord, for courts of justice, before they pronounce the dreadful sentence ordained by the law, to open to the prisoner the nature of the crime of which he is convicted; not in order to aggravate or afflict, but to awaken the mind to a due attention to, and consideration of the unhappy situation into which he hath brought himself,

" My Lord, the crime of which your Lordship is found guilty, murder, is incapable of aggravation ; and it is impossible but that during your Lordship's long confinement you must have reflected upon it, represented to your mind in its deepest shades, and with all its train of dismal and detestable consequences.

" As your Lordship hath received no benefit, so you can derive no consolation from that refuge you seemed almost ashamed to take

under a pretended insanity; since it hath appeared to us all, from your cross-examination of the King's witnesses, that you recollected the minutest circumstances of facts and conversations to which you and the witnesses only could be privy, with the exactness of a memory more than ordinarily sound; it is, therefore, as unnecessary as it would be painful to me, to dwell longer on a subject so black and dreadful.

"It is with much more satisfaction that I can remind your Lordship that, though from the present tribunal before which you now stand you can receive nothing but strict and equal justice; yet you are soon to appear before an Almighty Judge, whose unfathomable wisdom is able, by means incomprehensible to our narrow capacities, to reconcile justice with mercy. But your Lordship's education must have informed you, and you are now to remember, that such beneficence is only to be obtained by deep contrition, sound, unfeigned, and substantial repentance.

"Confined strictly, as your Lordship must be for the very short remainder of your life,

according to the provisions of the late act; yet from the wisdom of the legislature, which, to prevent as much as possible this heinous and horrid crime of murder, hath added infamy to death, you will be still, if you please, entitled to converse and communicate with the ablest divines of the Protestant church, to whose pious care and consolation in fervent prayer and devotion I most cordially recommend your Lordship.

"Nothing remains for me but to pronounce the dreadful sentence of the law; and the judgment of the law is, and this High Court doth award, that you," &c.

It was again Lord Northington's lot to preside as Lord High Steward in the year 1765, when Lord Byron was tried by his peers for killing Mr. Chaworth in a duel.

The accession of George III. to the throne in 1760, made a material alteration in the Lord Keeper's fortunes and prospects, The situation to which he had been raised by force of

unforeseen political combinations, and which he had retained in opposition to the wishes of the late Monarch, he now enjoyed with the full confidence and favour of the present. His new master conferred upon him an early and flattering mark of his regard, as on the 16th Jan. 1761, having delivered up the great seal to his Majesty, he received it back with the title of Lord Chancellor. This was followed by a most liberal extension of honour and patronage. By letters-patent, bearing date the 19th May, 1764, he was created an Earl, by the title of Earl of Northington, in the county of Southampton, and Viscount Henley, and on the 21st of the following August, he was, on the death of the Marquis of Caernarvon, made Lord Lieutenant of Hampshire.

Lord Northington continued to fill the station of Lord Chancellor during the three successive administrations of Lord Bute, the Duke of Bedford, and the Marquis of Rockingham. His health, however, had latterly become much impaired; his constitution was enfeebled by repeated attacks of gout: and

he had frequently, and for considerable intervals, been incapacitated from performing the laborious duties of his office. He had, therefore, early in the year 1766, desired an honourable and quiet retreat.

The feeble state of the Rockingham administration induced him, it has been said, to use the most strenuous endeavours to effect a change, by which his retirement might be agreeably secured. To what extent these endeavours proceeded, it is difficult at the present time satisfactorily to ascertain. It is certain that he had never been cordially attached to the ministry, and his antient obligations to Mr. Pitt, together with his personal friendship for Lord Camden, had convinced him that these were the only statesmen by whom a permanent administration could be formed. The first token of disagreement with his colleagues was evinced in some strong dissatisfaction which he expressed at a commercial treaty with Russia, that had been negotiated by Sir George Macartney, and to the acceptance of which he opposed many obstacles.

The next symptom of the storm whereby he overthrew the ministry was a strong ebullition of indignation at the council board; the affairs of Canada furnishing the opportunity for giving vent to his discontent. A report had been drawn up by the Attorney and Solicitor general, (Charles Yorke and de Grey,) for the civil government of Quebec. This had been submitted to the cabinet, and now the Chancellor condemned it with unusual acrimony and severity. According to Mr. Adolphus's account of this transaction, (whose information respecting the events of this period was derived from good authority,) at the first meeting of the cabinet, which took place at the Chancellor's house, he declared his entire disapprobation of the report, objected to some particular regulations, and gave it as his opinion that no proposition could be sanctioned till a complete code of the laws of Canada had been procured; a suggestion which, if complied with, would occasion the delay of a whole year. He also complained of some instances of inat-

tention which he had experienced. The meeting was dissolved without any definitive resolution having been adopted, and before a new one could be convened, he declared his resolution to attend no more.

On a subsequent day the Chancellor obtained an audience of the King, when he informed him that the administration could go on no longer; he declined in terms of the utmost plainness attending any more cabinet meetings, and recommended his Majesty to send for Mr. Pitt. This advice having been favourably received, the royal commands were given to him to confer with that statesman on the subject of a new ministry. This conference, which took place on the 12th of July, 1766, was opened by the offer of a carte blanche to Mr. Pitt; General Conway, who retained his situation of Secretary of State, assisting in the negotiation. Mr. Pitt, thus supported, formed the plan of the new administration without communication with Lord Temple, who was on the following day sent for from Stowe, and on the 15th had an interview with the King, at which the Chancellor

was present. After an unsatisfactory conference on the following day between Lord Temple and Mr. Pitt, at which the former found that all the situations had been disposed of without due regard to himself or his friends; a last interview took place between the Chancellor and Lord Temple on the evening of the 17th, when the latter told him that the farce was at an end, the mask taken off, and that he need not have sent for him out of the country, as there never was any serious intention of employing him. Thus was the friendship between the two brothers-in-law, which had existed for so many years, dissolved in anger, and Mr. Pitt left to the formation of a ministry embarrassed by the secession of so powerful a coadjutor.

The result of these negotiations, as it related to the public, was, that the Duke of Grafton was placed at the head of the treasury; Charles Townshend was made Chancellor of the Exchequer, with the lead of the House of Commons; Lord Shelburne was made Secretary of state; the Marquis of Granby was placed at the head of the Admiralty; and Mr.

Pitt, though in fact prime minister, took the office of Privy Seal, and was made an Earl.

As far as this arrangement regarded Lord Northington personally, his desired retirement was provided for on honourable and gratifying terms. He resigned the Great Seal, which was given to Lord Camden; and was appointed to the easy station of President of the Council, with a pension of £2000 per annum, in addition to the salary, and with a grant of an increase of that pension to £4000 per annum on his resignation of the office. The reversion of the Hanaper for two lives after the demise of the Duke of Chandos was also secured to him.

He took his seat as President of the Council on the 30th of June, 1766, and retained it for somewhat less than a year. But the gout, which had become more frequent and violent in its attacks, soon rendered it impossible for him to perform the duties of his new situation. The last effort of his public life was a very manly and powerful speech which he delivered in the debate in Nov. 1766, on the address respecting the embargo which had

been laid, in consequence of the scarcity, upon the ships preparing to sail with cargoes of grain. In the end of June, 1767, he declared to the King his resolution to resign in consequence of ill-health, and from that time till his death, which happened on the 14th of Jan. 1772, he took no further part in public business. He continued, however, in frequent correspondence with the Duke of Grafton, who always showed the most respectful deference to his experience and knowledge.

Lord Northington's judicial talents were of the first order. He was gifted by nature with an understanding at once vigorous and acute, and brought with him to the bench a profound acquaintance both with the science and practice of the law. He was remarkable for the great energy and decision of his mind, for the happy capacity of relieving an intricate case from extraneous and minor circumstances, while he grappled with and overcame its weightiest difficulties. His judgments are conspicuous for their clear, simple, and manly style. "He was a great lawyer," has been

repeatedly observed by the highest authority now living,* "and very firm in delivering his opinion."

By an accident, for a long time unfortunate for his fame, the proceedings in the Court of Chancery when he presided in it, had been most insufficiently reported. He had left, however, copious materials for a collection of his decisions in many elaborate Judgments written out in his own hand, and in full notes of the arguments of Counsel. The manuscript collections of Sir Thomas Sewell, Mr. Baron Perryn, Serjeant Hill, Mr. Hargrave, Mr. Coxe, and other eminent persons were able to supply deficiencies which might exist in these materials. From such sources the Author of this Memoir was fortunate enough a few years ago to present two volumes of his decisions to the profession, which have already passed into a second Edition, and which, it is satisfactory for him to know, have greatly raised the reputation of his ancestor with those best qualified to estimate it.

Notwithstanding the discouraging circum-

* Lord Eldon.

stances already noticed, which attached to the early portion of his judicial career, in succeeding so closely to the unrivalled fame of Lord Hardwicke, and being compelled so long to preside in the House of Lords as a Commoner, it is remarkable that during the nine years in which he held the Seals, Six only of his decrees were ever reversed or materially varied upon appeal. Of these reversals one is certainly erroneous; and two more are of such a nature that the profession were at the time, and are still, greatly divided on the correctness of them. The number of those decisions which, though not made the subject of appeal, have been overruled or shaken, is extremely small, certainly not exceeding three: and in one or two instances, where later decisions had gone in contradiction to his opinions, maturer deliberation and more extensive inquiry into principles and cases, have established the accuracy of the original determination.

Many Chancellors have played a more conspicuous part in the political drama, but few have passed through it with more dignity and

consistence. He preserved, from his first entrance into parliament, an undeviating attachment to the party which he had espoused; he shared its long proscription; he adhered to it when deprived of its royal head; and he finally received the reward of his honesty from the gratitude of the son of his original patron. He has been indeed accused of having effected the downfal of the Rockingham administration by intrigues and manœuvres. But this is an accusation more easily alleged than substantiated; and so far from ever having been proved, is negatived by all the evidence which has come down to us. His opposition to it was open and avowed. That administration, though composed of some of the most enlightened and virtuous men of the day, was totally unequal to the exigencies of the times; and fell to pieces according to an expression of Burke on another subject, "by the necessities of its own conformation." So far from being guilty of anything underhand, his attack at the council board was as open as Shaftesbury's abandonment of the Cabal, or Thurlow's outbreak against Mr. Pitt.

Lord Northington was fond of literature, and kept up his acquaintance with the Greek and Latin classics long after the period when the business of life draws most men away from these delightful pursuits. He was also something of a proficient in Hebrew. His favourite English author was Clarendon, the bluntness and loyalty of whose character he always admired, and in whose dignity of style he delighted. His daughter Lady Bridget, however, whom he employed latterly to read to him, used to declare that she derived much greater pleasure from the little anecdotes which she picked out of his briefs, than from all the stately periods of the historian.

In private life Lord Northington was a highly agreeable companion. He was, as we have seen in his early years, fond of the pleasures of convivial society, and even in maturer life enjoyed the excitement of it without its excess. George the Third used frequently to relate with great humour the mode in which he asked permission to abolish the Chancellor's Evening Sittings on Wednesdays and Fridays during term, that

he might have time to finish his bottle at his leisure, a permission which his Majesty for so excellent a reason most graciously accorded. He possessed a strain of vigorous wit and an originality of expression, in which he was followed, and perhaps outdone, by his great successor Lord Thurlow. Indeed, in several of their colloquial peculiarities, in a certain contempt of all affectation and false pretence, and perhaps a blameable disregard of some of the minor regulations of polite society, there was a strong resemblance between these two eminent men. But here the parallel stops, for as Thurlow excelled him, as he did most other men, in the immense vigour and capacity of his mind, so on the other hand Northington, with all his roughness of manner, possessed what the other had not—an excellent heart. He had many of the accomplishments and almost all the virtues which adorn social life.

In the domestic relation of husband his affection and kindness were unbounded. Of the multitude of his manuscripts of every description, political, legal, or confidential,

which have come to my hands, none has given me such unmixed gratification as a paper containing two beautiful prayers, which he composed for Lady Northington's use during the first years of their married life. One was written soon after their union, and the other upon the birth of a second child. She survived him for many years, and regarded them till the last hour of her life with an enthusiasm pardonable towards so interesting a memorial. I should not have drawn aside the veil from this instance of domestic affection, which may perhaps be deemed trivial and uninteresting, had I not thought it an act of justice to the memory of Lord Northington. For, partly from the gaiety and dissipation of his earlier years, and partly from the carelessness with which he permitted himself to indulge in private conversation, an opinion has been entertained prejudicial to his moral and religious character. Nothing however, as they who knew him best have testified, could be more utterly erroneous. He had a sincere and well-grounded belief in the grand doctrines of Christianity, and was, as touch-

ing his moral and social duties, (as far as the expression may be applied to human conduct,) blameless.

Though naturally warm and irascible, he was placable, generous and forgiving. The only exception to his almost universal kindness was in his manner towards his Son, with whom his deportment was marked by a stately reserve and coldness, according indeed with the fashion of a period when exaggerated notions of parental authority were still entertained; but which have now given place to more easy and confidential habits on the one side, without, it is to be hoped, affecting the cheerful performance of substantial duty on the other. But in the society of his daughters he was all that was playful and amiable; and their conversation, especially that of Lady Bridget Tollemache, was a delightful relief to him after the fatigues of business. The wit and conversational talent of this his eldest and favourite child were of the most brilliant order, and he derived great pride and satisfaction in calling them forth.

Lord Northington was in his person of middle height and rather thin. His portrait by Hudson accords with Bishop Newton's account, and represents him extremely handsome; and he appears to have retained, even after his elevation to the Seals, a degree of colour and freshness which is not often preserved by those who win the great prizes in this laborious race.

Lord Coke has somewhere remarked, that the marriages of lawyers are fruitful, and Lord Northington's was no exception to the observation. He had eight children, three sons and five daughters, of whom six survived him.

Robert, second Earl of Northington, was his only surviving son, the two others having died in their infancy. He was at an early age elected Member of Parliament for the county of Hants, and had the honour to represent it till called to the House of Peers by the death of his father. In 1771 he was made a Knight of the Thistle. He was a great personal friend and companion of the late Mr. Fox, and when the Coalition admi-

nistration came into power in 1783, he was appointed to the arduous station of Lord Lieutenant of Ireland, Mr. Wyndham being his chief secretary. The frankness and popularity of his manners, his good sense and firmness, fitted him for this elevated post; but the early dissolution of that short-lived administration removed him from this interesting sphere of action. He afterward died at Paris, on his return from Italy, on the 5th of July, 1786, aged 39. He was never married, and the title therefore became extinct.

The five daughters were as follows:

1. *Bridget*, who married, 1st, the Honourable Robert Lane, eldest son of George Lord Bingley, and, 2dly, the Honourable John Tollemache, son of Lionel Earl Dysart; and who, surviving her only son Lionel Tollemache, (killed at the siege of Valenciennes,) died without issue.

2. *Jane*, married to Sir Willoughby Aston, Bart., also died without issue.

3. *Mary*, married first to the Earl of Ligonier, and, 2dly, to Viscount Wentworth, died without issue.

4. *Catharine*, first wife to the present Earl of Coventry, also died without issue.

5. *Elizabeth*, married Sir Morton Eden, K. B. afterwards created Lord Henley, died on the 20th of August, 1821, and who, being the only one of Lord Northington's children who has left issue, the author of this Memoir, as her eldest surviving son, is heir at law of Lord Chancellor Northington.

APPENDIX.

I HAVE inserted for readers who are not professional, a few of Lord Northington's judgments on subjects of a more general interest, as a fair specimen of his judicial powers. I have stripped the cases of the long statements of facts and of the arguments of counsel, which, however necessary to enable a lawyer to arrive at correct technical conclusions, only tend to perplex and weary the general reader, whose object is either to ascertain the actual result of the decision, or to obtain a general notion of the style and powers of some eminent master of judicial reasoning. One of his most powerful and elaborate judgments I have thought too abstruse and technical to insert in this publication, though it is one of the closest pieces of reasoning in the books. It was delivered in the great case of *Burgess* v. *Wheate*, in 1759, where the question was whether the Crown was entitled by escheat to a trust estate upon the *cestuy que trust* dying without heirs. Lord Northington, then Lord

Keeper, called in to his assistance Lord Mansfield and Sir Thomas Clarke, the Master of the Rolls. These three eminent persons differed on the subject, Lord Mansfield being in favour of the claim of the Crown—the Master of the Rolls and the Lord Keeper being adverse to it. The latter decision has been approved of by many succeeding judges, and is at present the general opinion of the profession.

Duke of Marlborough *v.* Earl Godolphin.

This important case arose on the will of the great Duke of Marlborough, and is one of the low minded and selfish attempts which frequently occur where a testator endeavours to retain after death a control over his wealth beyond the limits allowed by law, and which have so often and so wisely been defeated. The duke devised his real estates to trustees, for several persons for life, with remainder to their sons in strict settlement; but directed his trustees, on the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the estate to such sons for their lives. The Lord Keeper held that this clause of revocation and resettlement was void, as tending to a perpetuity. It is singular to

remark how completely the testator would have defeated his own intentions, had his will been permitted to take the effect which he desired; for the estate would have been inalienable during the life of the late duke, and would have come entirely into the possession and control of the present.

The Lord Keeper.—The two bills that are now depending for determination are both brought to have the directions of the court concerning the executions of the trusts in the will of John, Duke of Marlborough. (Here his lordship stated the prayer of the first bill, &c.)

This cause came on to be heard in June, 1740, and several directions were given by the then Lord Chancellor, touching the accounts, application of the surplus, and other matters; but a question arising, " as to the power given by the testator's will to the trustees to revoke the uses thereby limited to the first and every other son of the respective tenants for life, and to limit the premises to the use of such sons for their lives only;" and also, " whether, in consequence thereof, the defendants, the Marquis of Blandford and John Spencer the infants, were entitled to limitations in tail, or for life only, in the settlement to be made of the estates;" his lordship declared that he would be assisted by the two chief justices and the chief baron in the deter-

mination of that question. He reserved it, and the cause as to that point has never been set down till now for a determination.

The other bill is brought by the present Duke of Marlborough, principally with a view of having that question determined, and a legal title in tail conveyed to him by the trustees accordingly. The other cause is set down upon the point reserved, to have a determination also.

The reason why I have not pursued the same plan as the noble and learned lord laid down is this, that the point in question is entirely new, and if it cannot be determined upon principles and reasons that afford a general satisfaction, the property is so immense, and the family so great, that I think it should be determined by the supreme judicature of this nation; especially as in one event it will lock up property, and keep it *e commercio*, far longer than can at present be done by any known or practised method of conveyancing. (Here his lordship read the principal part of the will.)

The grand question upon these two bills and the will of John, Duke of Marlborough, is whether I should, according to the prayer of the present duke's bill, order the trustees to convey to him the new purchased lands as tenant in tail, or as tenant for life; and at the same time order the surviving trustee to revoke the

uses of the will, so far as they relate to the limitation of estates tail to Duke George and his brothers, and to Mr. Spencer, and to direct limitations to them of those estates for life only. And this question will depend upon the effect of the revocatory clause coupled to a trust estate, which can alone be carried into execution by the aid and assistance of this court.

It is agreed on all hands that this clause is new, and that though it has been privately fostered by a particular family, from whence it issued, it never obtained any credit so as to be adopted by lawyers and conveyancers. Indeed it is so new, that it has acquired no name or species; for the counsel have called it a power, to which it has no resemblance, since it is imposed on the trustees as an act of necessity, whereas a power is a *facultas agendi vel non agendi.*

It being, therefore, a clause directory and compulsory to the trustees, (for every legal direction this court will compel a trustee to perform,) the provision is in substance neither more nor less than this—a clause in the Duke of Marlborough's will, in which he makes his great grandson, the present duke, (who was at the time of the making this will unborn,) tenant for life, with a limitation to the sons of such grandson as purchasers in tail.

It is agreed that the Duke of Marlborough

could not have done this by limitation of estate; because, though by the rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainder man as a purchaser, is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover.

Why the law disallowed these kind of limitations I will not take upon me to say; because I have never met, in the compass of my reading, with any reason assigned for it, and I shall not hazard any conjecture of my own; for technical reasons upheld by old repute and grown reverend by length of years, bear great weight and authority; but a new technical reason appears with as little dignity as an usurper just seated in his chair of state. So far, however, is plain, that the common law seemed wisely to consider that the real property of this state ought, to a degree, to be put in commerce, to be left free to answer the exigencies of the possessors and their families, and therefore admitted no perpetuities by way of entails; and though it allowed contingent remainders, it afforded them no protection.

The dissipation of young heirs, the splendour of great families, the propriety of annexing sufficient possessions to support the dignities obtained by illustrious persons, afford specious and colour-

able arguments for perpetuating and entailing estates; but in a country of trade and commerce, to damp the spirit of industry, and to take away one of its greatest incentives, the power of honourably investing acquisitions, would produce all the mischiefs and inconveniences of the statute of entails: and therefore the safety of creditors and purchasers make it, in my opinion, a matter of the highest importance, that the law should be fixed and certain with respect to the limitations of real property in family settlements; not subject to be questioned upon whimsical inventions, started (though by the ablest men) in order to introduce innovations in fundamentals.

One would think it strange that it should be admitted, (particularly in a court of equity, the jurisdiction of reason,) that the Duke of Marlborough could not limit his estate to Duke George for life, with remainder to his sons in tail male, because it is locking up the estate beyond the duration allowed by law, but that he may deliver the keys to another, and impower him to do that which he himself could not. That we should be arguing thus—this act prohibited by general policy *non potes facere per teipsum, sed potes facere per alium—non per directum, sed per obliquum.* For all the maxims of general good sense and everlasting reason are maxims of equity, but not rules in law.

The power and pride of the nobility introduced the statute of entails and perpetuities. The reluctant spirit of English liberty (depressed as it was before the revolution) would not submit to it; and Westminster Hall, siding with liberty, found means to evade it. Recoveries were established, by which alienations were introduced, contrary to the intent of the statute. What were the attempts made to frustrate this method of barring estates tail? Provisoes and conditions not to alien, with a cesser of the estate on any such attempt by the tenant. What was the determination of the judges? You shall not give a legal estate, and divest it of legal incidents. You shall not by condition restrain an estate tail from being alienable by the mode in which the law allows it to be aliened, nor restrain a tenant in tail from barring his issue by fine; nay, you shall not restrain a tenant in tail from committing waste, his wife from being endowable, or the husband of tenant in tail from being tenant by curtesy.

It seems to me most surprising, that after these puerile attempts had been made, upon the narrow, fettered, and technical reasonings of courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think that he could subvert the fundamental principles of property by the aid of this court.

This court considers all arguments and reasonings in the abstract, unclogged by any thing but the system of the law which it is bound to follow; I trust that it will never be so blind as not to see the legal limits; I hope that it will never be so arbitrary as to transgress them.

This court has no discretion to say how far perpetuities are to extend, and where they are to stop; the duty of this court is to give trusts the same extent as legal limitations, and to make the system of law and equity uniform.

It was said in the argument on this case, that it is determined that a person may, by executory devise, make an estate unalienable for one life in being, and twenty or twenty-one years after, but that the time not to be exceeded is no where defined, therefore that I might as well extend it *beyond* that period as others have *to* it. It is true that by executory devise, an estate may be locked up for a life or lives in being, and twenty or twenty-one years after. And that is in conformity to the course of limitations, and the methods of conveyance at law: for a limitation may be to one for life, with remainder to a person unborn in tail or in fee. If there are trustees to support contingent remainders, the remainder cannot be barred by the tenant for life, nor can it be conveyed by the remainderman till he attains the age of twenty-one. There-

fore the sages of the law have properly allowed a perpetuity as far in executory devises, which are accommodated to the exigencies in families, as in legal limitations. But at the determination of the period of one life, and twenty or twenty-one years, the estate is alienable. Whereas, could there be a succession of estates for life, with remainder to the issue of such tenants for life, the inheritance is locked up till the estates for life are all spent, and the remainder-man of the inheritance is twenty-one. As for instance, in the present case, had Duke Charles lived to seventy, and then had a son, and that son had lived to the same age, and then had a son, the inheritance could not have been charged or disposed of in less than 160 years: and unless the rules of limitation are adhered to, I cannot see any reason why this equitable modification might not as well be extended to any remoter generation than in the present will.

I have thus far considered this case upon its general tendency to a perpetuity, beyond what I conceive the rules of law allow; I shall now consider it particularly with regard to the operations it would have upon this family settlement, and the endless disputes, questions, and expenses such unusual clauses have been and always will be productive of.

In the first place, all the real estates Duke John

was possessed of are limited to the present Duke George in tail, and vested in him on his birth. I omit the absurdity in law, that the same person should limit an estate in remainder, and destroy it the moment it comes into possession.

But I want to know what this clause is. Is it a power? If so, it is discretionary in the trustees to execute it or not. But then, when are they to exercise their discretion as to the execution or non-execution of it? By the penning of the clause it is plain the testator intended the trustees, the survivors, and survivor of them, should be enabled to revoke. But when? At any time? There is nothing in the clause that imports it; no: they were empowered on the birth of each and every respective son and sons. Will it be said, that if they were empowered to revoke on the birth of a son, this court will enable and order them to execute that power, of which they have waived the execution? Suppose the clause had been penned with a greater latitude, (I am now speaking of it as a power, as the court on the former hearing and the counsel on this have called it,) and the trustees had been empowered and directed to revoke within one year after the birth of a son; could this court have extended the period, and supplied the defective execution of that power, in order to devest Duke George's estate?

But I really am of opinion Duke John never intended it as a power, in the accurate sense and obvious meaning of that word. He intended the revocation absolutely to take place, in case the events to which it applied ever happened; and to have perpetuated the estate one degree longer than usual by means of this *arcanum*, with which his lawyers had flattered his then predominant passion. The word *impower* seems to me to have been used in the will from a poverty of language in the drawer of it, as the word *direct* was to ensue; the properer expression would have been, *enable and direct*, for the word *impower* was used only to transfer a part of the old dominion to trustees, who were enjoined to execute the direction.

Perhaps it will then be said, if it be a trust enjoined the trustees to execute, then it remains during the particular estate, and the non-execution of the trustee cannot prejudice the *cestuy que trust*, and the court must consider it as done on the birth, and order at any time a revocation and new limitation, with a relation to the birth. And what would be the consequence of this doctrine? If the present duke had enjoyed the estate for forty years as tenant in tail, had cut timber and spent the money, a bill is then brought by a remainder-man to have the settlement made

pursuant to this clause, I must order him to refund perhaps £100,000, which he had innocently spent as his own money. Suppose he had married while he was tenant in tail, I must declare him tenant for life, revoke his estate tail, and strip his wife of her jointure; nay, perhaps after his death. And all leases executed by him as tenant in tail would become void, and the tenants be defeated of their estates and improvements.

And here I cannot help taking notice of an observation of that great writer, Lord Bacon, on the attempt to make a perpetuity by the introduction of a proviso conditional, which seems to me to be the same in substance with the present attempt. These "perpetuities," said he, "if they should stand, would bring in all the former inconveniences subject to entails, that were cut off by the former mentioned statutes, and far greater, besides raising unkind suits, setting all the kindred at jars, some taking one part, some another, and the principal parties wasting their time and money in suits of law; so that in the end they are both constrained by necessity to join in the sale of the land, or a great part of it, to pay their debts, occasioned through their suits."

In pointing out a few of those various disputes that necessarily spring from these innovating clauses, I think I collect the strongest reasons why the law will not admit them, and why every

court should without hesitation pronounce them void. If the law would permit the confinement of an estate beyond a life in being, and the time for a remainder-man's minority to expire; as the law is a system, it would have certainly allowed it to be done by way of limitation, where, the estate being limited, the extent of the owner's dominion is visible to all who transact with him; and the end of the law is in this country only quiet and repose. But to say, the law does not allow this by direct limitation, and yet allows the same thing to be effected, by I know not what magic, in the modification of an equitable estate, would be productive of infinite suits and questions, tending to defeat the design of both law and equity, and would make both a system of puerility and jargon.

It was said, however, that I ought, upon the authority of the case of Humberston *v.* Humberston, to order the limitations to be made as far as they may by law at the time of pronouncing the decree; and therefore that I ought now to decree an estate for life to the Duke and Mr. Spencer, with remainder to their sons as tenants in tail. That case is reported by Mr. Vernon and Mr. Peere Williams, and by both reports it looks as if there had been directions in that decree to that effect. But it seemed to me that such a decree, founded on events subsequent to the testator's

death, would be very singular, and not warranted by the rules of law or equity. I have therefore looked into the decree in the Register's book, and I do not find any part of the directions that appear to me to justify those observations. The words of the decree, as far as regards this purpose, are "That the master do see a settlement made of the residue of the trust estate, pursuant to the will of the testator, with limitations to the several parties named to be tenants for life in the said will, and to the heirs male of their bodies, in strict settlement, according to the course of law; and if any of the parties who are named tenants for life have any issue male living, their names are to be inserted into the deed of settlement." But not as tenants for life, but "according to the due course of law."

It was further objected, that I should not interpose, but leave the surviving trustee to act at his discretion. But there is no weight in that objection; for whether this be a power or a compulsory direction to the trustees, whether it be valid or invalid, the testator intended that the Duke of Marlborough, the plaintiff, should have his estate executed as soon as conveniently after his birth; he has a right, therefore, now, to have the trust performed, and can have it performed only by the aid and under the direction of this court.

Upon the whole, therefore, I am of opinion, and do declare, that the clause of revocation and resettlement in the will of John, Duke of Marlborough, is tending to a perpetuity, and as repugnant to the estate limited, is void and of none effect; and I do order and direct that the surviving trustee do convey the new purchased premises to the plaintiff George, Duke of Marlborough, in tail male, with remainders over, and subject to such powers, provisoes, conditions, and restrictions, as, consistent with an estate tail, are pursuant to the will of John, Duke of Marlborough.

This decree was afterwards affirmed in the House of Lords on the 7th of Feb. 1763.

Norton *v.* Relly.

This was a bill filed by the plaintiff, a maiden lady, residing at Leeds, against the defendant Relly, a methodist preacher, and others, trustees named in a deed of gift executed by her to the defendant, praying that it might be delivered up to be cancelled, &c. The bill stated, that the defendant procured one Woolfe to transmit to her a letter, in which he expressed himself as follows, "That although unknown to her in the flesh, from the report he had of her, he made bold to

address her as a fellow-member of that consecrated body wherein the fulness of the Godhead dwelt; that he had some thoughts of visiting her, the people to whom he preached, (though they had none among them whom they would chuse to hear in his absence,) being willing that he should come among them at Leeds for a little time to preach the kingdom of God." He subscribed himself the plaintiff's "most affectionate brother in the flesh." The plaintiff was prevailed upon by Woolfe to invite the defendant to her house, where she entertained him for a considerable time, and gave him money to defray the expenses of his journeys; he afterwards paid her a second visit, when he prevailed upon her to accompany him to town, and become one of his congregation. In the course of two years he obtained from her about £150 by various pretences; and at last persuaded her to execute the deed in question, granting to him an absolute annuity of £50, secured upon her real estates in Yorkshire. The bill contained several similar letters of the defendant, and stated several acts of fraud and imposition.

The Lord Chancellor.—This cause, as it has been very justly observed, is the first of the kind that ever came before this court, and, I may add, before any court of judicature in this kingdom:

matters of religion are happily very rarely matters of dispute in courts of law or equity.

In regard to protestant dissenters, under which denomination it has been attempted to shelter and include the defendant Relly, no man whatever bears a greater regard and esteem for those who really are so than I do; and God forbid that in the present age the true dissenters of every kind should not be tolerated, or that the spirit of Christianity should, in this kingdom, lose the spirit of moderation! I can and do esteem the professors of one equally with those of our own established church, to which, not only from the profession of my faith, but from my principles, I bear a higher veneration. But very wide is the difference between dissenters and fanatics, whose canting and whose doctrines have no other tendency than to plunge their deluded votaries into the very abyss of bigotry, despair, and enthusiasm. And though even against those unhappy and false pastors I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they properly come before the courts of justice? Men who go about in the Apostles' language, and creep into people's dwellings, deluding weak women: men who go about and diffuse their rant and warm enthusiastic notions, to the destruction

not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this court cannot relieve against the glaring impositions of these men? That it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? It is by no means arguing agreeably to the practice and equity of this court to insist upon it. This court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Yes, this court can extend its hands of protection: it has a conscience to relieve, and the constitution itself would be in danger if it did not.

To come to the present case: here is a man, nobody knows who or what he is; his own counsel have taken much pains, modestly, to tell me what he is not; and depositions have been read to show that he is *not* a methodist. What is that to me? But I could easily have told them what, by the proofs in this cause, and his own letters, he appears to be—a subtle sectary, who preys upon his deluded hearers, and robs them under the mask of religion; an itinerant who propagates his fanaticism even in the cold northern countries, where one should scarcely suppose that it could enter. Shall it be said in his excuse, that as to this lady she was as great an enthusiast as him-

self when he first became acquainted with her, and, consequently, not deluded by him? It appears, indeed, that she wrote some verses "on the mystery of the union of the Father, Son, and Holy Spirit." It is true that it appears by this that she was far gone; but not gone far enough for his purpose, as we shall find by his own letters: in one he says, "your former pastor has, I hear, excommunicated you; but let not these things discourage you, but put yourself in my congregation, wherein dwells the fulness of God." How scandalous, nay, how blasphemous is this! In another his mystical expression runs, "you will be there weaned from men, and learn to complete the fulness of Gospel peace." Thus was she advanced step by step, and imbibed his doctrines till she became quite intoxicated, if I may use the expression, with his madness and enthusiasm.

But the very material and most essential point in law, the consideration of the deed, say the defendant's counsel, is the dedicating the principal part of his time in attending the spiritual concerns of this lady, and neglecting his flock, who thereupon deserted him, (the only good thing, in my opinion, that appears in the cause.) But did he receive no consideration, no recompense for his service? Let us examine a little. Does he come from Leeds to London in the ordinary way,

a stage coach! No: he must have a post-chaise, and live elegantly on the road at the plaintiff"s expense; who, it appears, at different times gave to or paid for him to the amount of £52: 19*s.* in money, besides presents of liquor and other things. So that his own hot imagination was further heated we find by the spirit of brandy: for all which favours, in a third letter, his expression is, "I thank you in the name of our Saviour for all kindness to me." Thus is the Deity introduced to thank her for her services: but this, I suppose, like the fulness of God, as was observed by one of the counsel, is to be taken figuratively. I might, I believe, with more propriety say, that the acceptance of this £50 a-year was figurative, and expressive of his designs upon the lady's whole fortune.

We will take a short view how he proceeded to come at it. The lady comes to town by his persuasions, where possibly she had never been before; goes and lives in Surrey as in an inquisition, for she is put into a house environed by a high wall, and no one is to have access to her but her pastor, or the attorney, on the present occasion of preparing the deed in question, whereby the defendant was to step into and secure a part of her fortune under the veil of friendship, or rather by lighting up in her breast the flame of enthusiasm; and undoubtedly he hoped in due time to secure

the whole by kindling another flame, of which the female breast is so susceptible; for the invariable style of his letters is, "all is to be completed by love and union." But to return. In this place of inquisition she is by them tutored to be private in her charity; so that her relations, who are injured, were to know nothing of her present bounty. But would not any man of honour in the profession have told her, "Madam, you are going to do a thing which may embarrass your circumstances, and injure your relations; a thing which the law will not support unless it is fairly and openly obtained; and, therefore, unless you will apprise your friends of it, I will not be concerned." This, I say, was incumbent on the attorney to have done; but this was omitted, and it was done in secret.

Yet let it not be told in the streets of London that this preaching sectary is only defending his just rights, and must be supported in them: let them not be persecuted, I repeat, but many of them deserve to be represented in puppet-shows. I have considered this cause not merely as a private matter, but of public concernment and utility. Bigotry and enthusiasm have spread their baneful influence amongst us far and wide; and the unhappy objects of the contagion almost daily increase. Of this not only Bedlam, but most of the private madhouses, are melancholy and strik-

ing proofs. I have staid much beyond my time: I have given this cause a long and patient hearing, and, inasmuch as the deed was obtained on circumstances of the greatest fraud, imposition, and misrepresentation that could be, let it be decreed:—

That the defendant, Relly, execute a release to the plaintiff, Mrs. Norton, of this annuity, and deliver up the deed for securing it; and if any difference arise, let the same be settled by the master, who is to take an account of all sum or sums of money paid by the plaintiff, Mrs. Norton, to the defendant, or to his use; for which purpose all proper parties are to be examined upon interrogatories, and all which sums the defendant is hereby decreed to pay, together with the costs of this suit.

I cannot conclude without observing that one of his counsel, with some ingenuity, tried to shelter him under the denomination of an independent preacher: I have tried, in the decree I have made, to spoil his independency.

Fanshaw *v.* Rotheram.

In this case it was determined that there cannot be a prescription in *non decimando* against a law impropriator; but that it is not necessary to

produce the deed of severance; it is sufficient to show that it existed: and accordingly, as in the present case, the defendant, and those under whom he claimed, had been upwards of 130 years in the pernancy of the tithes; a bill by the impropriator was dismissed.

The Lord Keeper.—In this case two points have been argued at the bar, though one only has been insisted upon. I shall therefore take notice of and give my sentiments upon both of them, though I think the present cause ought to be determined upon neither.

The first is, whether a layman can prescribe against a lay impropriator in *non decimando*, and by immemorial nonpayment of tithes acquire a right of exemption from payment of them.

I do not find the general doctrine of the books disputed, that a spiritual person may, that a lay person cannot, prescribe in *non decimando*, but only in *modo decimandi*. This position has been constantly maintained without any restrictions or qualifications whatsoever, both before and since the statutes made on the dissolution of the monasteries. And this harmony of the books, and invariable opinion of the judges of the realm, establishes this proposition for law in all courts of judicature, as effectually as if it had been so declared by the legislature.

The judges and reporters, indeed, though they

all agree in the law, may, and I believe do, differ in assigning the reason upon which this law was grounded. But this does not, in my opinion, weaken, but rather strengthens, a point so fully recognized. For where the law is clear, and universally agreed upon, and yet an equitable reason does not obviously arise for the introduction of it, it is natural to suppose that, like other customs, it was introduced for general reasons of utility not now visible; and while they are permitted to prevail by the legislature, no private man should presume to question them.

But the most probable reason for its introduction seems the one assigned in the books—*in favorem ecclesiæ*. The wisdom of the law gave different liberties, rights, and privileges, to different members and orders of the community; particularly *sanctæ ecclesiæ*. These rights are sacred, and they can never be altered but by the whole community. Our kings by their coronation oaths have from time to time been bound to defend them. And when they have been abused, or by alteration of the civil circumstances of the times become inconvenient, the legislature has redressed them. I make these observations to show that a fixed law, whether positive or common, is not less obligatory because its reason is above our comprehension.

But a very good reason for this law may, in my opinion, be very easily assigned. The laws of this country had said tithes were due of common right, to be applied to the ends and purposes for which they were ordained. Consequential to that it was necessary to ordain that the temporary possessor should not alienate them from those purposes; and if the law had permitted a prescription in *non decimando*, a door would have been left open to such alienations, though juries had been as strict as Lord Coke supposes them regardless of their oaths.

If a judge, therefore, is to pronounce the law without any authority for fixing the reason of that law, what ground has he to alter the law, because he cannot approve the reasons that others have given, or though he may not be able to assign a satisfactory one himself? He must say the father shall be postponed to the uncle in succession to his own son; yet the reason why land gravitates, and cannot ascend to the father, but may to the uncle, is not quite geometrical. He must have said that a collateral warranty would have bound without assets (before the legislature said otherwise,) though the reason in the books is not quite manly. Yet I am thoroughly persuaded that these, and all such propositions in their origin, were grounded on great

and useful principles, because they are a part of a system of laws that have produced the noblest constitution in the universe.

Therefore, though Mr. Wilbraham would explain away this law as against a lay impropriator, and be *sine munere amicus* for the church; yet I must be equal to both. And I am very clear, as the law now stands, that no man can prescribe in *non decimando* against a lay impropriator. The cases to this effect are too numerous to bear citation.

The next question is, whether a man can avail himself of setting up a title to tithes, without giving evidence of a grant from the parson, &c. or impropriator, by showing that grant, or by proving that such grant existed and is lost.

In the first place it is to be observed, that the parson has not in himself the mere right of things, which he has in right of the church; the fee simple is in abeyance; so that every act that he has done may be avoided when he ceases to be incumbent, except such as were done with the consent of the patron and ordinary. The question therefore is narrowed to this; could an alienation with the consent of the patron and ordinary be set up without producing it?

Tithes in kind being of common right, the parson could sue for the subtraction in the court spiritual, and the only remedy for the person

exempted, by discharge, or composition, or by a *modus decimandi*, was by prohibition. The tithes compounded for, or discharged by a *modus*, became lay fee, and therefore the spiritual court could not hold plea of them. And if through ignorance in such case the owner set out the tithes, and the parson took them, he was a trespasser. The composition or *modus* became a spiritual fee, and was sueable for in the spiritual court. (Here his lordship read the whole passage.)

Now, it seems to me very clear, that by the rules of law, if the person suing this prohibition declared in attachment upon it, he is bound to plead this indenture with a profert. The books of entries prove this, and I can see no method by which he could avail himself of this discharge, without the production of the original deed whereby he claimed this discharge.

It is observable on this writ, that the prohibition must be supported not only by the grant, but an averment of the continuance of the recompense to the church, *G nunc persona Ecc' præd^a tenens præd' 4 Acras:* which makes the position of Lord Hobart in *Slade* v. *Drake*, fo. 297, questionable, that the grant of parson, patron, and ordinary, is good of itself, without any recompense or consideration: though that notion seems to be countenanced in the Bishop of Win-

chester's case, 2 Co. 44. But that opinion seems to be grounded on this, that a recovery against the parson with an *aid prier* of the patron and ordinary, and judgment by default, would bind the church. Which I conceive was owing to the credit of a recovery intended to be made on title, for I cannot find that parson, patron, and ordinary, could alien the possessions of the church, without a perdurable recompense.

I am therefore of opinion, that at common law no man could avail himself of a discharge from tithes by grant, but by producing it.

The next consideration is, what difference is introduced by the statutes, and whether title can be made to tithes without producing such grant at this time.

By statute 31 Hen. VIII. c. 13, s. 2, parsonages appropriated, belonging to dissolved monasteries, are to be held and enjoyed by the king, his heirs and successors, in as large and ample a manner and form as the religious persons held the same. Now the religious persons held the appropriations with a title by common right to tithes, uncontrolled by a prescription in *non decimando*, or by any title set up against them by any means but a grant produced, showing a severance, or by real composition, as I have before endeavoured to make out.

In this sense the statute is taken by the court

in the case of the Corporation of Bury *v.* Evans, Com. Rep. 651, where this observation is made, "As Lord Hobart saith, in Slade and Drake's case, fo. 296, a temporal person succeeding a spiritual person in discharge (and it is the same in the perception of tithes,) is to be reckoned as a spiritual person, and not as a temporal; and consequently a man who could not prescribe against an ecclesiastical person, cannot any more prescribe against the patentee, who derives his title from and under him, and is in nature of his representative." If he cannot prescribe against a temporal person, which must be by plea, because that temporal person is in *virtute* and *vi statuti*, in the place and capacity of the spiritual, the same reason holds against his pleading in any other manner, or any other discharge or exemption against a temporal, than he could have insisted on against a spiritual person.

But it is said, that tithes are now become lay fees, and persons may have remedy for recovering their rights to them in the king's temporal courts; and that they may be assured and conveyed as lands and tenements; and therefore it is said, that a man may make the same title to tithes as to any other inheritance, and that he may supply the loss of this original grant by subsequent conveyances and possession. But it seems to me that this statute 32 Hen. VIII. is

silent as to the *manner* in which a person must make out his right to tithes against the church, or patentees standing in the place of the church. The statute seems to have left that as it stood at law, and only provides that a person lawfully seised or possessed of tithes, and disseised or put out, might assure and recover them in the king's courts, like other temporal possessions. Before this statute the king's temporal courts exercised no jurisdiction over them; they could not be demanded in a præcipe or other writ, no writ of covenant, no fine could be levied of them; and the statute supposes that the *Chancery* was to devise and form new writs for recovery of them; though this was found unnecessary, as the judges were of opinion that a special count would answer that purpose.

But the statute was anxious not to be expounded so as to vary the trial of the right to take them, or the defence against paying them. And therefore the seventh section provides, " that this act shall not extend nor be expounded to give any remedy, cause of action, or suit in courts temporal, against any person refusing to set out his tithes. But in all such cases the person, being ecclesiastical or lay, shall have his remedy in the spiritual court, according to the ordinance in the first part of this act (section 2,) and not otherwise." So that this act seems to

have left the suit for subtraction of tithes, and the defence against such action, as it was left by the statute 27 Hen. VIII. c. 20, where in section 3 the proviso is, " that every person and persons being parties and privies to any such suit, shall and may make and have his and their lawful action, demand, or prosecution, appeals, prohibitions, and all other defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample and liberal manner and form as they might have had if this act had never been made."

It is true that in all cases of temporal rights, the courts of law consider *quieta longa, et pacifica possessio* as the best evidence of title: I think it one of the wisest and most solid rules of the law. They will therefore presume stale titles in writing barred by other conveyances probably lost, because the possession contrary to those conveyances cannot otherwise be accounted for. Possession is so strong a title that a judge may have emphatically said, he would presume an act of parliament to support and confirm it. Possession is a title to recover upon, and *primâ facie* evidences the mere right. But not in this *anomalum*, the case of tithes, for there it evidences no right, though it should be *ultra memoriam hominis quieta et pacifica*. Where possession evidences a right, there may be reason to presume

somewhat to answer a stale and latent title: but where possession does not evidence a right, there seems to be no grounds for such a presumption; because that would be to presume *a title*. I suppose in this reasoning that I have before proved, what is in effect conceded, that simple possession is as ineffectual against a lay impropriator as against a spiritual person.

But it is objected, if this be so, no man can safely purchase from a lay impropriator, for the deed of severance cannot be preserved for ever; and if the deed be lost, the title is lost, and the inheritance purchased reverts to him that sold it. But I by no means think this consequence would ensue; for I do not think it necessary to this defence to produce the deed of severance, but to give evidence that there was one. The law requires only the best evidence that the thing in dispute will admit of, and a very slight proof might be sufficient to establish such a deed of severance, though it were lost.

And therefore the opinion that I give is only that a title cannot be set up at law against the common right by length of possession of the tithes, or by simple grants of them, or by both together.

I have given my opinion upon the points of law abstractedly considered: I will now apply them to the particular evidence of this case, and to the jurisdiction of this court.

9 Feb. 30 Eliz. this rectory of the church of

Dronfield was vested in the crown, and the tithes arising in Dronfield and Holmsfield were severed and granted to Edmund Downing and Miles Doding and their heirs. I am of opinion that from that moment these parcels became lay fee, discharged of all privilege and protection that was connected to them by the statutes as spiritual inheritances; and that, between the proprietors of them, and all persons claiming under the grantee, every species of defence was and is competent as between plaintiffs and defendants, in a contest respecting any other lay inheritance; and the reconveyance of these tithes not being produced, I cannot consider the plaintiff as making any title to them.

The residue of this rectory, for what appears to the contrary, continued in the crown to the 24th of May, 1612, and is then granted to Francis Morrice and Francis Phelps, and their heirs, and particularly all tithes in Coldaston and Stubley, *int. al.* 4 July, 4 Car. 1628. The said premises are conveyed for a consideration of £750 to Lionel Fanshaw and his heirs. From 1628 to this time, a period of 131 years, this residue is supposed to have descended without any intervening settlement to the present plaintiff; and though no enjoyment has ever been had of the right in question, which all this time has been alienable; a court of equity is desired to interpose,

and disturb a right enjoyed for almost a century and a half.

Now that kind of equity is beyond my comprehension. Bills for quieting men in their rights and possessions against the latitude of legal controversies, and multiplicity of suits, have manifest equity, dealt with a sober hand. But bills to disturb and disquiet men's possessions, would be in the highest degree rigorous and oppressive. The voice of the law is *caveat emptor;* the voice of equity is, *teneat emptor*, though his title be bad and defective, if he has not purchased with iniquity.

The defendants appear before me with a merit which this court ever recognizes; the merit of being purchasers for a valuable consideration: with respect to the tithe of Dronfield and Holmsfield, they appear to be purchasers before the grant of Jac. 1. in which the grant of Queen Elizabeth is excepted; and with respect to the tithe in Stubley, they are purchasers in the year 1632, with a regular deduction of title to the defendants.

So that I should decree for the plaintiff against about 130 years quiet possession, when he, and those in whose place he stands, have been guilty of a wilful and inexcusable negligence during the whole period. And upon what? Because the title of the purchaser may be defective in law. Now that seems to me to be contrary to all equity;

a purchase for a valuable consideration is a bar to the jurisdiction, unless repelled by showing that the purchase was made against conscience. Will it be said they purchased with notice of the common law right of the rector? How can I say that at this distance of time? How can I say that no other parts of this rectory were severed? That the purchasers were not made to believe they were? And either of these cases would bring them under the protection of this court. Nay, I am of opinion, the paying their money does; and that the plaintiff must repel the merit of that, by affecting the purchase with iniquity, to entitle himself to the aid of this court.

I may be mistaken; but in my judgment and conscience, I think I should pronounce on the most narrow and illiberal principles in decreeing for the plaintiff, and make this court an inquisition to torture men's titles.

However, I have much more able judgments than my own to strengthen me in this opinion. The case of Medley *v.* Talmey, 8 W. 3., was much weaker for the defendant than the present case. There the defendant insisted only on a deed of purchase of the land tithe free in 1652; and though but forty-two years' possession in the defendant, and consequently the same laches in the plaintiff, the court left the parties to law, and dismissed the bill. The observation on this case in Comyns is, "It is probable the defendant had

a legal exemption, which the plaintiff was conscious of, but thought to take an advantage of the loss of the defendant's deeds : but the court, not favouring his design, dismissed his bill." It is ten times as probable here, that the defendant originally had a title. For the tithes themselves have been actually bought and conveyed several times over.

The next case is the Corporation of Warwick *v.* Lucas, where a defendant insisted generally on a discharge by virtue of a prescription, bull, order, or other lawful means, and had ever since been held free. The bill was dismissed. Now in these two cases the court determined that equity could not give its assistance to disturb men's possessions, for in neither was there any pretence of a severance.

And the comment in the report to avoid the effect of them is destitute of truth and sense. It is said, "In these cases it did not appear directly whether the defendant could make out a legal discharge or not." Now in Medley *v.* Talmey, it directly appeared that he could not, for the defendant only insisted upon, and only proved at the hearing, the deed of 1752, and swore by his answer all other deeds were lost. In the second case no particular exemption was insisted upon by the answer, yet the report goes on, "It was probable they could, and the plaintiffs thought it so probable, that they cared not to try that point,

and consented the bills should be dismissed without costs." Now how could the plaintiffs think that the defendants could show a severance or composition, when they had alleged no such thing in their answers? But what is the conclusion; "If the defendant has a probable ground of discharge, it is not proper to decree against it, without putting it in a way of examination, which the court seemed willing to do in these cases." And in the case of the Corporation of Bury *v.* Evans, the grounds of the determination with respect to the discharge were, "There is nothing to induce a probability, that Eldo Farm and Old Haw Farm were the same;" so that, with respect to the present case, I consider these three cases as authorities for my decision.

But here I desire to be understood that I express no concurrence in the other point in the corporation of Bury *v.* Evans, viz. that a court would decree against a long and pacific possession, if no probable discharge is alleged. For 29 Car. 2. Dr. Reeves, dean of Windsor, exhibited his bill against Mr. Levison, to discover writings concerning some tithes in Woolverhampton, parcel of the corporation of the deanery; the defendant pleaded a fine, levied Hil. 13 Eliz., and a non claim by the present dean, which was allowed to be a good plea. For as I am at present advised, I renounce all concurrent jurisdiction on the legal right of tithes, and think I can only decree on an equity.

I do not know whether the authority of these two cases has ever been decreed against; they have never been appealed from, which gives them great strength in my eye; and the case of the Corporation of Bury *v.* Evans is a mere legal determination, without a grain of equity.

It is a hard case to make a man lose what he has innocently purchased. So hard, that the rigor of the law treats it with equity. A mortgagee getting a verdict against the opinion of the judge, shall not be molested with a new trial for the honesty of the cause. A wrong-doer, *per negligentiam*, shall have the same indulgence. And shall a court of equity wrest from the owner inheritances descended from an ancestor, and bought with the patrimony of a family? I profess I cannot, as a judge of this court, have a difficulty; *Equitas enim lucet ipsa per se, dubitatio cognitionem significat injuriæ.*

SIMS *v.* BENNETT.

IN this case it was decided that the question, whether a tithe be great or small, is to be determined by the nature of it, and not by the mode or place of its cultivation, or the use to which it is applied, and, therefore, the tithes of beans and peas, though gathered green by the hand for the

food of man, are a great tithe, and included under the term *decimæ garbarum.*

The Lord Keeper.—This is a bill brought by the vicar of Eastham for tithes of beans and peas gathered green and sold in the market. The bill seems to admit that had these beans and peas come to maturity, the rector would have been entitled to them; and, therefore, the question is, whether, from their being gathered green and sold in the market, the vicar is entitled.

The rector is of common right entitled to all sorts of tithes: the vicar can claim against the rector only by endowment or prescription; and, therefore, in Spring's case, Moor, 761, it is holden, that a rector cannot prescribe against a vicar endowed; because where an endowment is, no prescription can prevail against it. So in the same book, 910, *minutæ decimæ* carry not the tithes of glebe lands, because the endowment goes no further than the words of the donation carry it.

In this cause it appears from the evidence that the usage of gathering green is new and modern, occasioned, perhaps, by the increase of the inhabitants in this town and neighbourhood; but be that as it will, the plaintiff, the vicar, is in possession of no such right to the tithes of beans and peas gathered green, &c. by prescription. And the fact of usage giving the vicar no such right, I cannot decree for him upon his claim

until it is established at law, to be the law, that the vicar is entitled to the tithes of such beans and peas.

But the endowment has been insisted upon on the part of the vicar, and this has been treated as a new case; and as it has been mentioned so to be by the counsel on both sides, I shall give my thoughts upon it.

That tithes are due *jure divino* is a doctrine now exploded; the right, therefore, depends upon municipal laws. By those laws the demand is given *de communi jure* to the rector, and the vicar's right can be only by endowment, or by prescription and usage as evidence of an endowment. There being no prescription in this case, it brings it to a question of construction upon the words of the endowment.

The endowment was made by the Bishop of London before any statutes relating to endowments: the words are, "*Vicarius habeat et percipiat decimas hortorum, ac omnimodas decimas, præter decimas garbarum fœni et molendini.*" It has been insisted that beans and peas gathered green could not be *garba*, and, therefore, could not go to the rector; for that *garba* signifies *grain* bound up in a sheaf, which beans and peas gathered green could not be; but this is a fallacy, for when the law speaks of *garba* or sheaves, it speaks of the whole produce, stalk and all. The word *garba* means *quod ligari potest*, and proba-

bly peas were actually garbed when the word was introduced into the canon law; but since that, barley, oats, and peas are not garbed, and wheat continues to be garbed, because the straw is of value, and to preserve it unbroken, and yet barley and oats are *decimæ garbarum*, which words carry great tithes in contradistinction to vicarial tithes. Spelman explains *garbæ* to be such fruits of the earth as are naturally fit to be bound, and Lindwood explains it the same way. It follows, therefore, that *garba* means and refers to such grains as, when come to maturity, were usually or might be bound together, and does not extend to things improper to be bound.

The old cases make the nature of the thing to be the distinction between small tithes and great tithes. So is Udall *v.* Tindall, Cro. Car. 28; Wharton *v.* Lisle, 4 Mod. 103; and Bedingfield *v.* Frake, Moor, 909, where corn was holden to be great tithes in a garden, and the modern cases concur with the distinction. Nicholas *v.* Elliott, in Bunbury, is unintelligible in itself, but has light given to it by Gumley *v.* Burt, in Bunbury, where the distinction is holden.

There have been cited Stephens *v.* Martin, and Nicholas *v.* Elliott, against the distinction, and no other cases. The first case is answered by its being observed, that in that case it did not appear what the endowment was, or whether the impropriator contested it. And as to Nicholas

v. Elliott, it appears by Gumley *v.* Burt, that the usage in that case made the difference. These cases prove these two propositions: first, that the vicar has no claim to tithes but by endowment or prescription; secondly, that where the endowment is not by special but by general words, as *minutæ decimæ*, the law distinguishes between the tithes according to the nature of the thing; and the mode of the cultivation, as in garden-like manner, does not alter the tithes, as in Gumley *v.* Burt; much less can the mode and time of gathering alter the right, which has attached in the rector before the time of gathering. The rector is entitled at the time of committing the grain to the earth, and it would make his right strangely precarious and uncertain to put it upon the management of the owner; if that were the case, then a great tithe, gathered before it comes to maturity, would be a small tithe; and yet in Hodgson *v.* Smith, in Bunbury, tares cut, whether green or ripe, are a great tithe. Nothing breaks into these resolutions, but that the Exchequer have determined the tithe of clover-seeds to be a small tithe. The reason the Exchequer made the difference between seed and the other cases was not grounded on reasoning, but on authority. It was because Lord Coke laid it down that seeds were *minutæ decimæ*, and the Court of Exchequer did rightly in conforming with that rule as it was established; and, therefore, that case of seeds is

to be considered as an exception to the general rule, and does not vary the rule itself; but this exception has never been carried further than to seeds, not to grain.

But another distinction has been taken from the application of peas and beans to sustenance of man, not of cattle; but this will not hold, as it would go too far, for if things are small tithes because used for the sustenance of man, it would comprehend all grain, as barley for beer or bread, and oats for bread or family uses.

Therefore I am very well satisfied, in point of law, that these tithes are rectorial; but if I had not been so, I should have decreed against the plaintiff for want of enjoyment. Let the bill be dismissed; but, as it is a new case, without costs on either side.

This decree was afterwards affirmed in the House of Lords, 7th December, 1762.

The Attorney General *v.* Cholmley.

In this case an agreement had been made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition in consequence of the rector's losing certain rights of common by inclosure, and also providing an annual pecuniary compensation in lieu of tithes. Upon the successor's declining

to abide by it, an amicable suit was instituted, to which the ordinary, (but not the patron, who was the king,) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles. It was now determined that this agreement, though acquiesced under for eighty years, (forty of which, however, the rector, against whom the decree was made, had remained incumbent,) was not binding as to the pecuniary composition, the patron not having been a party, and the composition having been made only with regard to the past, and not to the future increasing value of the tithes.

The Lord Chancellor.—This is an information brought by the attorney general at the relation of Dr. Blair, for an account and payment of tithes in kind; the claim of the rector arises *de communi jure*. The defence set up against the claim is, first, an agreement entered into in the year 1664 between the then rector and the owners of the lands in the parish, for accepting a yearly sum of £80 in lieu of tithes. I am of opinion that the agreement on the face of it is unequal as to the consideration thereby agreed to be paid to the rector; for it appears that the agreement was entered into in order to effectuate an inclosure of the open fields in the parish, and no consideration is given as to the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit. But I am clear that even if

the agreement had been equal, it would not have bound the successor in the rectory, but would be void as against him.

The next defence set up against the plaintiff's claim is a decree in 1677, which appears to have been made in a cause, instituted by consent, between the same parties that were parties to the agreement in 1664; for as to the bishop of the diocese being a party, I consider him set up as a man of straw, merely for form. And it is material to observe that the parties themselves did not consider the agreement which had been executed as binding on the rector; for they considered the annuity of £80 as not being an adequate consideration for the rector's having given up his tithe in kind, and, therefore, they entered into a new agreement for allowing him an addition of £16 : 8*s.* 7*d.* per annum; and on being allowed that addition, the rector by his answer consents to have the agreement established. It is true that the decree founded on this agreement does, *in verbis*, bind the successors in the rectory; but this was a decree founded on an agreement, which the court never enters into the propriety of, when a bill is brought by consent of parties; and all such decrees are drawn up by the register of the court in the words of the agreement, as a matter of course: but I am of opinion that such decree cannot bind the successor. The defendant's counsel have, it is true, cited cases of a similar

nature, and urged the case of Edgerley *v.* Price, reported in Finch. I have looked into that case, and think it a very extraordinary one, particularly as the judge sent for the parties to attend him. I can pay no credit to it, nor look upon it as any authority, or any thing more than the dream of some note-taker in this court.

The agreement and the decree being thus laid out of the case, the next consideration is, whether a court of equity can relieve in the present case. And I am of opinion that there is not a better rule than that of *equitas sequitur legem.* It is a fixed rule at law, that the crown and the church cannot be prescribed against: the first, on account of its high dignity; the second, on account of its imbecility: *quia fungitur vice minoris, conditionem suam meliorare potest deteriorare nequit.* At common law, although the church could alienate with consent of patron, parson, and ordinary, yet it was under various restrictions. The patron must be absolutely seised in fee simple: if he was seised only of a fee simple conditional, or bare fee, the alienation was void. Thus it stood till the disabling statutes were passed, which were wisely framed to prevent all alienations, except by authority of parliament. The patron was under the influence of interest: the parson complied with false notions of gratitude; and the ordinary, where the crown was the patron, (especially if he had one of the lesser

bishoprics,) was not so unprejudiced in his consent as he ought to be. In the present case, the bar set up by the defendants amounts to a mode of alienation. If the decree be void, as I am of opinion it is, what then is there to send to law when the point is about the extent of a decree of this court? And even if it were sent thither, it must come back again to be ultimately determined here.

It has also been objected that the length of time ought in this case to bar the plaintiff; but I think the legal rule, that no prescription can run against the church, must be adhered to. And, indeed, the length of time for which this agreement has been acquiesced under is not so great as at first sight appears: Mr. Adamson, who was rector in 1677, and party to the decree, and had a right to establish the agreement during his life, did not die until the year 1718.

It has been further objected by the counsel for the defendants, that the plaintiff's bill prays to set aside the agreement so far only as relates to the composition in lieu of tithes; but submits that the lands allotted in lieu of ancient glebe may continue in the state they now are in, which the defendants insist the plaintiff cannot do, but that the agreement must be confirmed or rescinded in *toto*, and that the rector must give up the lands allotted to him under the agreement, which they contend are larger in quantity than

the ancient glebe, and which additional quantity was a further consideration to the rector in the exchange. But this would be making wild work, and, indeed, the proposition was only adopted at the bar as an effort of despair. I am clear that the lands allotted to the rector were only in lieu of the ancient glebe, and that the difference arose from the different quality of the land. The agreement, though contained in the same deed, is distinct; one part allotting land in lieu of the ancient glebe, the other providing an annual stipend in lieu of tithes. I have no reason to think that the lands allotted to the parson were for more than the glebe and tithes. It is the quality of the land, and not the quantity, which must determine the extent of the composition.

Upon the whole the inclosure of the lands was for the general benefit of the parish; and such lands will be continually increasing in value, while the composition given to the rector in lieu of tithes will be continually diminishing in value; the composition here looks only to the value of the past tithes, without any regard to the future increasing value of tithes. In all acts of parliament which are made upon compositions with parsons, they are allowed a compensation for tithes upon improvements in *futuro*. If in the present case the parties had made an allowance for the future improved value of tithes, they would have stood on a different footing, and I

should not have been inclined to relieve: they then would have been purchasers for a valuable consideration by allowing for the future improvements. The equity of this court would have been suspended by setting up equity against equity, and I should have left the rector to his legal remedy.

Decree an account of tithes from the time of filing the information.

This decree was afterwards affirmed in the *House of Lords*, 21st November, 1768.

Drury *v.* Drury.

The Lord Chancellor.—(After stating the prayer of the bill and the settlement.) The question is, whether, sitting in a court of equity, I can bind the infant to a specific performance of this agreement, and bar her from claiming her dower at law and her share of the personal estate under the statute?

The law of England, which, from a principle of natural and political wisdom, allowed and encouraged early marriages, and from a principle of equal wisdom disallowed young persons to enter into personal contracts till they attained a reasonable maturity of judgment, (which the universal consent of this nation fixed at the age of twenty-one,) found it necessary to accompany

their maturity for natural contracts by its own provision for the civil rights, reciprocal to both the parties that entered into the marriage state.

In this, as well as in other cases, the ancient law neglected personal estate as an object then, as it really was, of no consideration, and solely regarded the realty. The *quantum* provided for the wife was one-third of the lands and tenements of which the husband was seised during coverture, with a reciprocity as to the nature of the estate, which was required to be such, as if the wife were seised of the like estate, the husband would be tenant by the curtesy. Of this provision, made by law, she could not be deprived, nor could the husband augment it but by contract after their respective ages of twenty-one years; for if the husband varied this proportion by endowment, *ad ostium ecclesiæ*, he must be of full age: if the endowment is *ex assensu patris*, it is of lands, &c. whereof the father is seised in fee, and consequently is the endowment of the father, and not of the son; but in both these cases the woman is not bound till she enters and agrees after the death of the husband. The law throwing descents first on the males, seems to have considered the woman as purchaser, and sufficiently invited by dower to matrimony, though she paid as a price for it her personal estate.

This seems to be, in brief, the wisdom and

provision of the law touching rights consequential to the marriage contract; and I cannot find that the law apprehended, or that, in fact, it happened that marriages were impeded or procrastinated by the disability of minors to agree to settlements. If a want of such power is attended with impediments of that sort, the legislature knows when to interpose, and is alone, in my opinion, equal to authorize the regulations.

The law has been indeed much arraigned as being too liberal in its provisions to the wife; and it was asked, what man of £15,000 *per annum* would marry, if the wife was to take a third, when the heir was to be cramped to £10,000 *per annum*, and stinted in luxury, expense, and diversion, for the sake of his mother? It was intimated that the husband might put in trust what part of his estate he pleased; to this it was answered, "true, but then he cannot in his own name avow on his tenants." I do not find, however, that these considerations weighed with the legislature: I am sure they ought to be weighty indeed to induce this court to vary legal rights.

But it is said that the law is altered by that part of the statute of uses which relates to jointures, and that by the operation of that act, a husband, settling any proportion of his lands on his wife to vest in possession on the death of the husband, may bar her of her dower, though she be a minor. And, secondly, that this court, fol-

lowing the law, should bind a minor marrying, where the provision made is as effectual and substantial for her. And, thirdly, that this is the present case. And for the first position is urged principally, that the words of the statute being general, comprehend infants as well as mature persons, there being no saving but a particular provision to permit women to waive a jointure made during coverture.

At the time of making the statute of uses (27 Hen. VIII.) it appears that lands were in general conveyed to uses; and the statute recites many inconveniences and wrongs resulting from that practice; whether they all really existed may perhaps be a question. The remedy at the same time provided by the statute was the most obvious and effectual that could be thought of, by annihilating uses, by transferring the possession to the use.

One of the grievances recited was, that uses fraudulently deprived women of their dower, because the woman could be endowed of that estate only whereof the husband was legally seised. But as it very often happened that men had kept part of their estates in use, and taken a legal seisen for the rest as a provision for their wives and issue, pursuant to the marriage agreements, as appears by the sixth section of this act, which recites, that "whereas divers persons have purchased, or have estate made and conveyed, &c. unto them

and wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies, or to the heirs of one of their bodies, or to the husband and wife for the term of their lives, or for term of life of the said wife;" and consequently as the operation of the statute would enlarge in many cases the dower of the wife contrary to the agreement of the marriage, the statute enacts, with a retrospect, and with a future regulation, " that where any such estate or purchase as are before recited have or hereafter shall be made, &c. for the jointure of the wife, that then every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue," &c. The ninth section provides, " that if any wife have, or hereafter shall have, any manors, &c. unto her given or assured after marriage, for term of life or otherwise in jointure, except by act of parliament, and the said wife after that, fortune to outlive her said husband, the wife may, after the death of the husband, refuse, and take her dower at common law."

Upon the state which I have drawn of the common law, the wife, a minor at the marriage, was under a disability of depriving herself of dower *ad communem legem;* and this is a point always to be had in view in the construction of the statute concerning jointures.

The next material observation which occurs

to me is, that to support the plaintiff's claim, this statute must operate either as a statute enabling an infant to agree to a jointure and bind herself, or, secondly, that it enables the husband to impose a jointure on the infant wife, *nolens volens*, at his own will and pleasure as to the *quantum*.

Now that it should have been the legislature's intent to have given maturity to an infant to enter into so material a contract under a natural defect of judgment, and contrary to the protection which the law, from intrinsic equity, in all cases extended to infants, I think, should appear to this or to any court in capitals before it can be so pronounced. Nothing, in my opinion, can evince such an intent but express words, not capable of being mistaken, and uttered by an authority that must be obeyed. In the statute now under consideration I find no express mention of infants, nor a hint throughout the whole that their case was particularly under consideration, or any intimation of a design to change their rights, or deprive them of their legal protection.

But it has been urged from the statute to prove such intent, first, that the words are general, and that infants are comprehended. Now that argument must be supported upon this, that the general words in an act of parliament must be expounded in a sense as universal as the terms will reach; whereas I conceive that they are restricted *secundum subjectam materiem*, and the legal con-

sideration of the acts, and persons to which they are referred; and that an exposition, *ad ultimam vim terminorum*, is exploded by the best authorities, and by such authorities as have grown to the strength of rules and maxims of construction.

By the statute of Gloucester, c. 1. The disseisee shall recover damages in a writ of entry founded upon disseisin against him which is tenant. But if a feofment be made to three jointly, and the survivor never agreed, though he becomes tenant he shall not be liable to damages. Lit. sect. 685. Lord Coke's comment upon this section is as follows: "Here it appeareth that acts of parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged. And therefore, in this case, albeit the letter of the statute is, generally to give damages against him that is found tenant; and in this case the survivor is found tenant, yet he shall not be charged." 1 Inst. 360. *a*. And in fo. 365. *b*. he states other cases within the letter and general words of a statute not comprehended in it, and draws this rule, *qui hæret in litterâ hæret in cortice*. And in fo. 372, *b*. he lays it down as a maxim, that the surest construction of a statute is by the rule and reason of the common law; and if, without regard to this rule, enabling statutes were to extend to infants, the law has been hitherto very much mistaken.

The statute of wills (32 H. 8. c. 1.) enacts in more general words than the present, "that all and every person and persons having, or which hereafter shall have, lands, &c. may devise." The words comprehend having lands, why not infants at fourteen? They can dispose of £100,000, why should they not of £500 per annum, six times less valuable? The act was made for the end of natural and civil justice, the payment of debts, and provision of children. Plausible reasons! and yet it does not extend to infants. But in order to enable an infant to agree to a jointure, and to take less than the law has defined as a reasonable provision, is it to be held that it does extend to them? Why, and for what reason? Because we are told that men are become too sordid to marry on those terms, and that she would otherwise be compelled to live unmarried to twenty-one.

So again in the construction of the statute 31 H. 8. that "all monasteries and colleges, &c. which shall happen to be dissolved, &c. or by any other means come to the king's highness, &c. shall be, by authority of this parliament, vested in the actual possession of the king;" it was adjudged that a monastery coming to the king's hands by the statute 1 E. 6. was not within the act, though comprised within the general words; and this upon the authority of the determination on the 13 Eliz. c. 10. that bishops, though com-

prised within the general words, were not within that statute: Archbishop of Canterbury's case, 2 Rep. 46. These are authorities so well established, that, as I said, they are grown into rules and maxims.

But, secondly, it was urged, and very properly laboured by Mr. Solicitor General, that the provision with respect to jointures made to feme coverts proves the rule of construction to be general where not provided for; but nevertheless I cannot help thinking that the provision for them was rather inserted *in majorem cautelam* against the general words of the statute, which are obligatory as to settlements made on wives, and within which description infant wives, as such, would have been comprehended.

These are the reasons which will not suffer me to think that the statute enabled infant girls to agree to settlements so as to bind themselves, and bar them of their legal provision, dower.

Secondly. If the statute does not operate so as to enable the infant wife to accept a settlement, it must operate so as to enable the husband to impose a jointure on her, *nolens volens*, at his own will and pleasure as to the *quantum*.

I really know not which of the propositions is most repugnant to natural justice, and to the principles of the common law; for the estate which is to bar dower is of no defined value by the statute, and if it be made up of the qualities

and accidents specified, it is a legal bar, and every court of law is bound to accept it as such. But it was said, if the jointure was disproportionate this court would relieve on the head of fraud. I have attended very closely to that answer, but am entirely at a loss to find any foundation for it. What measure is the court to make of this disproportion? The husband's estate? The wife's fortune? Her family? Her person? Her endowments? I am lost in the impossibility of equity's interposing, and frightened with a jurisdiction that I should attempt to introduce.

I have examined all the cases that were cited, and many authorities both in law and equity, and have not been able to find that the courts have bound an infant by any agreement not confirmed after twenty-one.

27 Car. 2. 2 Cha. Cas. 211. Coker was seised of a church lease in trust for Robert Strickland, an infant. On a treaty of marriage between the infant and the plaintiff, and in consideration of £1000 portion, an indenture was made, with the consent of Coker, the infant's guardian, whereby the infant covenanted that the wife's life should be inserted by way of jointure; but there was no covenant by Coker who sealed the indenture. The book says the marriage took effect, the husband (not saying then an infant) dies; the lease was surrendered, and wife's life put in; she came for an assignment, and Coker claimed an incum-

brance on the lease which the court postponed to the wife: the relief was against Coker's fraud, and no question was made on the infant's covenant. And it is to be observed that the case is not in Lord Nottingham's MSS.

Franklin *v.* Thornbury, 1 Vern. 132. is a paltry note of the reporter's, where he says, in the same case, "an agreement being void against an infant, yet was decreed; the infant having received an interest under it after he came of age;" which imports, that otherwise it would not have been decreed.

In Cannel *v.* Buckle, the principal case is only upon the execution of an agreement by a wife of maturity, notwithstanding the subsequent marriage, where it was objected as a general rule, that no specific performance could be decreed where no damages could be recovered at law. The court refutes that general rule by this case; suppose a feme infant seised in fee on marriage, with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband. If this were done in consideration of a competent settlement, equity would execute the agreement. The state of this case supposes the infant to die in her minority, or before she had confirmed such agreement. This is no adjudged case, and for my own part I very much differ from the supposed decree in this supposed case.

Two opinions, indeed, of very eminent judges have been cited upon the binding force of this statute: the one of Lord Hale's, from a marginal note in Co. Lit.; the other of Lord Hardwicke, from a note taken at the bar.

As for the marginal note supposed to be Lord Hale's, it is too uncertain for me to make a serious comment upon; as also is that argument, much built on and laboured, the want of curiosity and oscitancy of conveyancers, who, it is said, when they hear the word jointure are satisfied, and never inquire whether the woman is a minor or not when she is married; that is, in other words, whether the dower was barred or not; a point which, unless we have much mispent our time, was certainly worth inquiring about. Besides Mr. Attorney General's conveyancers differ from Mr. Wilbraham's, for, according to his account, they never thought about it; which is natural enough, their time being more dedicated to perusal than thought.

As to the alleged opinion of Lord Hardwicke, I shall not presume to treat it as his opinion. I concur with him in every reason which was material for the determination of that cause; this was not. If it had been, I should have taken the liberty of conversing with him upon it before I pronounced my decree. Considering it, therefore, as a position in the abstract, I differ from it; and upon the best information I can get, till the

courts of law judicially determine the contrary, I am most clearly of opinion "that a jointure made before marriage on an infant wife may be waved after coverture."

Having declared my opinion upon the first question, I have not a great deal to add on the second and third points, which may, and indeed will be reduced to one. But I cannot help taking notice of the particular settlement in question, and laying it down as a principal ground of my determination, that the interest there raised to Lady Drury is destitute of all the substantial qualities required by the statute. First, No legal estate in lands, &c. is conveyed to the lady; secondly, no equitable lien on any real estate of the husband is created. For though it is said that the annuity is to be in the name of a jointure, it is agreed to vest only on a contingency, and to attach not on Sir Thomas, but contingently on his representatives; and unless there were proof of mistake or fraud, I do not conceive this court could interpose to better the security.

27 Car. 2. in Gladstone *v.* Ripley, Lord Nottingham held, first, that a jointure of a copyhold is no bar of dower at common law. Secondly, that an agreement precedent to marriage to accept it as such, makes it a bar in equity, and therefore he staid the suit at law.

But as I have in this case been forced to give my opinion that Lady Drury could not, being an

infant, have bound herself by the acceptance of a legal estate, I should be inconsistent to say that she has bound herself by the acceptance of this covenant, which is no security at all for the annuity intended by Sir Thomas.

A bill in equity is a very uncomfortable jointure, a very uncertain maintainance, and not a remedy so near at hand as an ejectment. Besides, in the present case, it is to be bought at the price of dower, and her share of the personal estate under the statute of distribution or otherwise.

Declare, that the defendant, Lady Drury, being, an infant at the time of her executing the indenture of the 5th of October, 1737, was not barred of her dower in the intestate's real estates, nor of her share of his personal estate under the statute of distribution.

EARL OF BUCKINGHAMSHIRE *v.* DRURY.

THIS was an appeal from the above decree. After hearing counsel, it was proposed to ask the opinion of the judges upon the point of law, who, differing among themselves, were directed to deliver their opinions *seriatim*, with their reasons. Accordingly Mr. Baron Gould, the Lord Chief Baron (Parker), and the Lord Chief Justice of the Common Pleas (Pratt), delivered their opinions in support of the decree. Mr. Justice

Wilmot, Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, in opposition.

The Earl of Hardwicke.—I concur entirely in opinion with the majority of the judges, but I do not think it necessary to resume the arguments at large, but shall only take notice of such of them as lead to the determination of the merits. For their opinion on that point is not conclusive, though it was necessary that they should be taken from the declaration in the decree, because equity follows the law, and to know whether the infant would have been bound by a legal jointure. I shall therefore rely on the opinion of the four judges; but I must observe thus much, that the time which has elapsed since the statute, and the silence and want of resolutions on this head are stronger arguments than a great many cases; for it shows this point has never till now (and it is 235 years since the statute,) been called in question.

The practice of marrying young persons of fortune under age was more frequent in those days than in later times, the reason was from the law of tenures and wardships. For if a man died, leaving a son or daughter under age, the lord would be entitled to the marriage, and otherwise to have the *valor maritagii:* therefore it is clear, a father, as soon as his son or daughter came to a marriageable age, would himself choose a marriage for them. This shows that these

marriages and jointures on infants must have been more frequent than in modern times. The lord too was equally forward; for if the father died, and his child was unmarried, the lord would tender marriage as soon as the child attained the marriageable age, for otherwise he might lose the marriage.

One thing on this statute was truly laid down, that the retrospective provision is penned in the same manner as that for the future; and that if the statute did not bind such women as were then married, it did not bar them of dower, and then would not have cured half the mischief, and certainly, from the reason of tenure, above half were married under age at that time.

Another thing was mentioned by Mr. Justice Wilmot, who began for the affirmative, and entered largely into the subject, and explained the nature of jointures very ably, and threw a new light on the cause by entering into the law relating to provisions and settlements of this kind, as they stood before and at the making of the statute: he said, that the statute intended to create a bar by jointures then made, or after to be made, without any regard to a contract.

The chief justice of the Common Pleas puts it upon the foot of a contract; but the recital of the statute supposes the contrary, for it recites the instances of settlements of inheritances, and they might be made by ancestors of the husband.

Where then is the contract? But the chief justice gave a definition of a jointure, that it was a contract for a provision for the wife after the death of the husband. I say, no book defines it so. Lord Coke and others say, it is a *provision of livelihood*, but do not take in the word or idea of *contract*. I was therefore surprised at the positiveness with which this was asserted.

Let us reflect on the usage in families before this law. In most great families a particular estate was kept in that state, and usually so settled from generation to generation. In most great families there is a house that is called the jointure house; and the case in Dyer proves, that if a father or grandfather settles on his son or grandson, and such woman as he shall marry, it is a good jointure. Where in such case can be the contract? The wife is supposed to rely on that when she marries.

As to the cases of Seys *v.* Price, and Harvey *v.* Ashley, it has been affirmed that they were determined singly, upon the authority of the 1 Inst. 37. I believe that book was produced, but as to their proceeding singly upon that *dictum*, I deny it. Though the passage is very material, and the counsel argued upon the observation, " that a jointure made to her under or above the age of nine years is *good*," contending, that it meant *good* to bind both parties. For otherwise, as Lord Coke was so accurate a writer, it is pro-

bable that he would have gone on and said, "unless the wife was an infant." Neither was it that authority that determined Sir D. Ryder in the case of Harvey *v.* Ashley, to give up that point, and admit in words that the infant was bound by it and barred of her dower.

Another thing was said, that the authorities cited were cobwebs thrown over the statutes. I rather think they are lights upon the statute. One of those lights was what is mentioned by Hale in the margin of the 1st Inst. which was treated with great disregard, [here his lordship pronounced a high encomium on Lord Hale, and said he had always been looked upon as one of the greatest luminaries of the law,] and though it was called a private note, his MS. authority had been always highly esteemed; the original was given by Lord Hale to the brother of Phillips Gybbon, who lent it me when I was young at the bar; and in the original book cases are cited in the margin under Lord Hale's own hand, written in his strongest time, when he was judge of the Common Pleas, before the restoration. Lord Chief Justice Holt, who was as great and able a judge as ever sat in the King's Bench, (except Hale,) when he doubted of points of law, has borrowed manuscripts of Hale's family to decide his opinion. I think, therefore, that things from reverend hands deserve to be treated with reverence.

The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No; the received opinion ought to govern. The ablest men in the profession have been conveyancers. Sir Orlando Bridgeman, (a book of whose precedents has been published,) Webb, a great practiser in the King's Bench, was an able conveyancer, and the present Mr. Filmer.

In the next place, the judgment and established practice of the Court of Chancery, is I think of the greatest weight.

From these considerations I take it for granted that the law and foundation of this case is settled, that an infant, having a proper jointure made, is bound and barred by it.

The next thing is the consideration of equity, whether the jointure, or an equivalent to it, will not bind in a court of equity? To determine this, let us define what is a jointure. The law does not say a contract for, but a competent provision of livelihood. Then the general rule is, equity follows the law in the substance, though not in the mode and circumstances of the case. Therefore, if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. Every certain provision with consent of the wife, parents, or guardian, though not a join-

ture within the statute 27 Hen. VIII. is good in equity. This is built on maxims of equity, which regards the substance and not the forms. What for good considerations is agreed to be done, is considered as done, and allowed all the consequences and effects as if actually done; especially if the condition of the parties is changed, for that cannot be rescinded; so what is fairly done before ought to be established. This jurisdiction of equity is grown up from necessity from the change of circumstances and times, and to comply with the occasions of families and the exigencies of mankind.

As property stood at the time of the statute, personal estate was then of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after, (I wonder how they ever happened to do so). But the chief kind of property then regarded was freehold estate in land, and so the statute applied to that only. But how many species of property have grown up since, by new improvements, commerce, and from the funds. Equity has therefore held, that where such provision has been made before marriage, out of any of these, she shall be bound by it. Consider how many jointures there are now made on women out of the funds, and none of them within the statute 27 Hen. VIII. So multitudes of jointures out of trust estates, not one of them

within the statute; yet equity has always supported them. So also of copyhold lands.

The case of Jordan *v.* Savage was decreed by Lord King. [Here his lordship gave a great character of him, and remarked, that he had been Chief Justice of Common Bench, in which court only writs of dower can be brought.] And though it has been said she took possession of the lands limited to her for jointure by the articles, I answer that the question was upon the free bench, which extended to the whole land, therefore her entry upon part of the land did not bar her of the rest.

Vizard *v.* Longden, in which I was counsel, was also decided by Lord King. That was a bill brought by the brother of the husband, who died intestate, against the widow, for an account of the personal estate, and to be relieved against her claim of dower by reason of an agreement contained in a condition of a bond entered into before marriage. She by her answer said, that her husband agreed to settle on her a clear annuity of £14 per annum; and no particular lands were mentioned (omitting in her answer the words which were in the condition, for her provision and maintenance,) and prayed to have the annuity made good out of the real estate, the personal being deficient, and also to have her dower. The master of the rolls declared in his decree, that there was not any sufficient proof of

the averment, that it was in bar of dower, and so decreed the £14 per annum to be made good out of the real estate, and also dower. But Lord King reversed the decree upon consideration, and declared she was only entitled to the £14 per annum out of the real estate of her husband, by virtue of the bond, and that the said £14 per annum was a bar of dower out of the residue. 1st. I observe this bond must have been general, without mentioning specific lands, because she claimed on this footing, that the personal estate was insufficient to answer the annuity. 2dly. That the master of the rolls had no doubt but that this general agreement had been a sufficient bar of dower, provided it had been sufficiently expressed or proved that it was so agreed.

Another case is Davila *v.* Davila, 2 Vern. 724, before Lord Cowper. Covenant in consideration of the intended marriage and £1000 portion, to pay his wife, if she survived him, £1500 in a month after his death, in full of dower, thirds by the custom of London, or otherwise, out of his real or personal estate. The husband died intestate, without issue, and the widow brought a bill against the administrator to have a moiety of the personal estate by the Statute of Distribution; to which this covenant was pleaded by the administrator, and that he was ready to pay the £1500, and Lord Cowper allowed the plea, and said, " that possibly the husband might think it

not necessary to make a will, and devise the estate to the next of kin, because he knew his wife was barred by the agreement;" against that decree there was no complaint or appeal.

I have already alluded to a number of cases of jointures out of the funds; many must have been on infants. What confusion might not this introduce in families, if parties were to be left to their legal rights. These cases were so frequent in courts of equity, that reports, and even notes, ceased to be taken of them.

But it has been said, the agreement in the present case was originally vicious, by reason of particular defects in it; that nothing certain is contained, no particular lands specified, and no remedy for the wife to compel the husband in his life. But the cases I have mentioned, and also the case upon Lord Lechmere's marriage articles, where it was only a general covenant, are all answers to the objections. And besides, there are two other answers: 1st. If there had been danger of Sir T. Drury's dissipating, and he had spent this equitable jointure, that would have been an eviction in equity, and consequently would have given her right to dower, like the case of an eviction at law, for equity pursues the reason of the law. 2dly. But he could not have spent it, *i.e.* not his real estate; for if any one was about to purchase, he would certainly have asked whether Sir Thomas was married, if his

lady was jointured, and when this was produced would have seen a settlement, or insisted on a settlement being made, or that the wife should join in a fine.

Another objection was, that the covenant is too short; but the agreement is general, whereas the covenant is, that his heirs, &c. after, &c. shall pay; therefore, that as there is no covenant for himself, there was no remedy to compel him in his lifetime. But I differ from that, for I think, upon the first clause, that she might by her next friend have brought a bill to compel him, because it is a general agreement that she should have the annuity for, and in the name of, her jointure, which are the proper legal words, and the language of pleading. Then has he not covenanted in every circumstance to make a jointure, one property of which is to take effect immediately in possession on the death of the husband, which could not be unless it was settled in the life of the husband?

Another objection was, that this was an inadequate jointure; a hard bargain. But this is a clear annuity of £600, [here his lordship mentioned the lady's circumstances.]

I cannot conclude this head without resorting back to the long established course of the Court of Chancery in the case of infants, who are under the care of that court. Many came before me whilst I sat there in families of the first quality.

One I particularly remember, which I would mention, because it includes my great predecessor. The Duke of Hamilton married Miss Spencer, who had £40,000 in money, and a considerable real estate. There was a reference to the master for the duke to make proposals; the report being defective, it was sent back, and then it came before me, and I concurred in it.

But it is objected that the Court of Chancery does no more than the father or guardian, the best it can, but the infant has the same privilege to wave when she comes of age. When this was the only answer given by so able an advocate as the solicitor general,* I conclude it unanswerable; for this is no answer at all. It is saying no more than that this great court draws in and deludes families. People think, when they resort to that court in respect of infants, that it has a sovereign jurisdiction for what they do. and that trustees and all are indemnified. And what is so done must be in the case of infants.

It is improper for me to mention my own precedents; but in this practice I followed a great example, Lord Nottingham, [and here his lordship enumerated all the chancellors, including Lord Talbot.] Have they all concurred to draw in and delude families? If this should be law, every one of us deserved to have been impeached as being guilty of the greatest abuse and delusion

* Sir Fletcher Norton.

of families. Such a series of practice and precedents make the law. A great part of the common law is so. What, therefore, might not be the consequence of overturning all this established course ?

Then the inconveniencies of persons claiming under family settlements ; remainder-men may have a third part of their estates torn from them, and the jointure perhaps go to another. Nay, purchasers for valuable considerations may be prejudiced, for they can have no relief if the woman is not bound. And no person of a great estate will be able to marry an infant unless she finds surety to bar herself at twenty-one by a fine. Beauty, virtue, and merit, cannot always find such surety. If this decree should stand, it must stand irretrievably, for I cannot think how any statute could be devised to reform it. There was considerable difficulty in framing the statute of wills. But these cases are so various it would be impossible to imagine all the cases which are fit to be cured, and which are not.

The second general point is, whether she is barred of her distributary share of the personal estate. This, as to the value, is the material point.

If any thing can be clear in equity, it is this : if such agreements are fairly entered into, they will be decreed. It is truly objected, that a proper statute jointure could not bar this. But yet,

if such a jointure had gone on in such words, or to the same effect, as those which have been used in the present case, it would have excluded her. I have seen many such precedents: some concerning wives of citizens of London, where the customary right has been allowed to be barred by a jointure, and the wife is said to be compounded with.

2 Vern. 665, Hancock *v.* Hancock, where a wife of a freeman of London is compounded with before marriage, by having a jointure, though of land, she is taken as advanced, and the children shall have her moiety as if she was dead, 1 Vern. 6, Love's case. If this is allowed in such case of a custom, *à fortiori* in personal estate not within the custom; for in the case of the custom she has a sort of paramount right superior to her husband.

It is objected, that this arises from agreement; but that an infant cannot agree. But certainly an infant so near of age, wanting only two months, might bind herself as to personal rights. She was capable of devising away all her own personal estate. This is not so strong. It is not to deprive her of her own, but to exclude her of the contingency of any part of her husband's personal estate. And here he has in effect said, so far I make my will already, that you shall not have any part of it.

All these contracts are looked on to be for the

benefit of the husband and his family, that if he dies intestate, his children or family, and not his wife, should have his personal estate. See the case of Davila *v.* Davila, before cited, and Lord Cowper's reasoning at the end of the case; that the husband might think it not necessary to make a will, because he might consider his wife barred by the agreement.

A contrary construction would be to make this adult infant commit a fraud upon her husband, by claiming in contradiction to the articles. But minors are not allowed to take advantage of infancy to support a fraud. There was a decree by Lord Cowper, (analogous to the case in 2 Leo. 108, of Piggot *v.* Russell,) where tenant in tail applied to borrow money on a mortgage, the attorney's clerk who ingrossed the deed was the issue in tail, was then about the age of eighteen, and knew of his being issue in tail, but took no notice of it. Lord Cowper relieved against this minor, and would not suffer him to take advantage of his own fraud.

In this case I must take it Sir Thomas Drury relied on this agreement, and therefore made no will, and otherwise that he was drawn in and deceived.

Lord Mansfield.—The general question is, if Lady Drury, having the provision stipulated for her by her marriage articles, is not barred of her dower. I entirely agree with the noble and

learned lord who spoke last, that a jointure is not a contract, but a provision made by the husband, &c. as defined by Lord Coke, and, therefore, that the consequence drawn from an infant's incapacity of contracting is ill-founded. I must also deny what has been advanced in the argument of the present case, that either by the law of England, or any other law, every contract made by an infant is void. Here his lordship cited the words of the *Edictum perpetuum (de Min. tit. 4,) quod cum minore gestum esse dicitur, uti quæque res erit, animadvertas.*

By our law some agreements bind absolutely, some are void, some are voidable. Contracts for necessaries, such as diet, education, &c. are good, (Bac. on Uses, *versus finem*,) and the infant's body liable to be taken in execution for them. So of a sum advanced for taking an infant out of gaol. Infancy never authorises fraud; as if goods were delivered to an infant, and he embezzle them, trover would lie against him; or if he took an estate, and was to pay rent for it, he should not hold the estate, and defend himself against payment of the rent, by pretence of infancy. If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again. If he receives rents, he cannot demand them again when of age. In Watts *v.* Haiswell and Treswick, where the issue in tail being eighteen years old, himself ingrossed the mort-

gage deed made by his father, and did not discover his right to the mortgage, Lord Cowper held him bound thereby, because, being of years of discretion, he had acted dishonestly in not discovering his title, and expressed his assent to the rule that had been laid down, of infants deriving their protection from those they contracted with, *i. e.* from the nature of the contract, if fair or otherwise.

Were infants not bound by such agreements as this, no lady could marry under age without her father or some near friends becoming security that she would when of full age join in a fine to bar herself of dower, which, if she should afterwards refuse to do, the husband must have his remedy for a collateral satisfaction against the heir of her father, or such next friend, which would make wild work. I approve the distinction taken by Mr. Justice Wilmot between infants contracting for conveying away something of their own, and where for barring themselves of a right which is a third person's.

Consider the agreement in this case, and what the circumstances of it are. It is an agreement for the infant's advancement. Marriage is so. What sort of a marriage? With the consent of her father or guardian. Lady Drury was then nearly twenty-one: there is no objection to the fairness of the transaction. She had only £2000

for her fortune; it was an advantageous bargain for her at the time,

Better terms may be obtained for infants by parents and guardians than when they are of full age: by much the greatest number of women are married when under age; but they are not thereby to be made an instrument to defraud others, for there is no difference in effect whether the fraud be premeditated, or the circumstances by subsequent events be turned into fraud. If the statute of Henry VIII. had never been made, courts of equity would have given relief; but I am clearly of opinion that infants are barred under that statute. That act was made for uses, not for jointures: this is a provision arising out of the general consequences of uses.

Consider also the usage and transactions of mankind upon it: the object of all laws, with regard to real property, is quiet and repose. As to practice, there has almost been only one opinion. The greatest conveyancers; the whole profession of the law; Sir Orlando Bridgeman, Lord Nottingham: there was not a doubt at the bar in Hervey *v.* Ashley: Mr. Fazakerley always took it for granted that infants were bound.

If this decree were to stand, marriage settlements would be totally subverted without the interposition of the legislature; and I concur with the noble and learned lord, that no man

living could draw such an act of parliament. I will never put such an exposition on the law as to make it necessary to apply to Parliament to rectify it.

Decree reversed.

THE END.

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